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# THE FEDERAL REPORTER.

VOL. 14.

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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

NOVEMBER, 1882—MARCH, 1883.

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ROBERT DESTY, EDITOR.

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SAINT PAUL:  
WEST PUBLISHING COMPANY.  
1883.



## P. LORILLARD &amp; Co. v. DRUMMOND TOBACCO Co. and others.

*(Circuit Court, S. D. New York. February 28, 1882.)*

## LABEL.

Neither a letter nor a horseshoe, nor any such simple device, can be claimed as a label.

*Gifford & Gifford*, for plaintiffs.

*S. S. Boyd*, for defendants.

BLATCHFORD, C. J. The first claim of the reissue ["Improvement in Plug Tobacco," granted to Charles Siedler, October 24, 1876.] is the only one involved in this suit. That claim has not been directly sustained in any suit on final hearing. It was not directly sustained in the suit against Dohan. The third claim was infringed and sustained in that suit, and the novelty of that claim was put upon the ground of a distinction between metallic letters too large to have enough to answer the purpose of a label, and a label with letters on it. If in that suit the first and fourth claims were considered, the word "label" in those claims did not require, for the purposes of the infringement, that any label not having letters on it should be considered.

The defendants' device in this case is a plain metallic horseshoe with no letters on it. It may be a trade-mark, but as such it is not like the plaintiffs' device as a trade-mark. As anything else, it is no more a label than the letters which, in the Dohan case, were held not to be labels were labels. A single letter, recognizable as such, is quite as much a distinguishing mark made by a piece of separate material as is a piece of metal of the form of a horseshoe. The letter B would be called the letter B, and the plain horseshoe would be called a horseshoe; but, to sustain the patent, neither can be called the label referred to in it.

The motion is denied.

See *Hostetter v. Adams*, 10 FED. REP. 838.

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# UNITED STATES

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# CASES

ARGUED AND DETERMINED

IN THE

**United States Circuit and District Courts.**

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**WINSTEAD v. BINGHAM.\***

*(Circuit Court, N. D. Georgia. August, 1882.)*

**1. MORTGAGE LIENS—ASSIGNMENT OF.**

In regard to the assignment of mortgage liens the law of Georgia does not differ from the general rules of law and equity, and therefore, in that state, a transfer by delivery of a promissory note payable to bearer and secured by mortgage, carries with it the mortgage lien, so that the holder of the note may foreclose the mortgage by suit in equity in his own name, and without making the mortgagee a party.

**2. ARTICLE 1996, CODE OF GEORGIA.**

The article 1996 of the Code of Georgia does not in any way provide for mortgage liens.

PARDEE, C. J. The bill in this case is for the foreclosure of a mortgage given by defendant to one Freeman, executor, to secure the payment of a note of even date therewith payable to bearer. The hearing is on the merits, and the proof consists of the notes in question, produced by complainant, and the mortgage duly executed as set forth in the bill. Neither note or mortgage show any assignment in writing, and the question for decision is whether, in such a case, under the law of Georgia, the bearer of the note takes any title sufficient to foreclose the mortgage in his own name.

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

At common law and in equity it is well settled that the incidents follow the principal, and that the transfer of a note secured by a mortgage carries with it the mortgage security; so that the transfer by delivery of a note payable to bearer, will transfer the mortgage given to secure the note. And the law of Georgia is the same, unless there has been a change made by some statute of the state. See 9 Ga. 86; 32 Ga. 228.

The statute claimed to have made this innovation is the act of 1873. Sess. Acts 1873, pp. 42 to 47. Section 21, the last of the act, is to the effect that "all liens herein provided for may be assigned by writing and not otherwise, and under such assignment the assignee shall have all the rights of the assignor as regulated by this act." An examination of the entire act shows that the first section declares certain liens to be established, among which is the lien by mortgage. The second section provides for the superiority of liens for taxes,—first for the state, secondly for counties, and thirdly for municipalities. The third section is to the effect that certain liens, to-wit, in favor of judgment creditors, of mortgage creditors, and in favor of the state for costs, shall remain as under existing laws, except when altered by the subsequent provisions of the act. The remaining and subsequent sections relate in no manner to provisions for the mortgage lien, and in no way alter the mortgage lien. No adjudicated cases from the supreme court of Georgia are cited where the last section of the act in question, or section 1996 of the Code to the same purport, have been construed so as to cover assignments of mortgages.

The case of *Dalton City Co. v. Johnson*, 57 Ga. 398, cited by counsel for defendant, throws no light on the question; the notes sued on contained no negotiable words, and there was no assignment proved in writing or otherwise.

The case of *Turk v. Cook*, 63 Ga. 681, referred to, is not in point. That was a suit brought on an open account, without an assignment in writing.

The case of *Planters' Bank v. Prater*, 64 Ga. 609, cited, would cover the case, had the question under consideration been before the court. That was a suit brought on an absolute conveyance of real estate, with a bond to reconvey on the payment of certain notes payable to order, which notes were not indorsed, but were transferred by delivery. *Jackson*, Justice, in giving the opinion of the court, says:

"It will be remarked that the note itself was only transferred by delivery to the bank, though payable to the order of Matthews & Co., and therefore that the question *does not arise* whether the transfer of the legal title to the note carried with it in equity the conveyance of the land as a security. It might well be doubted that if it had been indorsed it would carry an absolute deed to the land, such as this transaction is made by our statute, over to the indorsee. Code, §§ 1969, 1970."

The learned justice then proceeds:

"And even if the transaction made a mortgage, it would seem that under the act of 1873 (Acts 1873, pp. 42-47; Code, § 1996) the assignment must be made in writing to be valid, inasmuch as the twenty-first section of that act declares 'that all liens herein provided for may be assigned by writing and not otherwise;' and mortgages are provided for in that act."

This is clearly an *obiter dictum*, and not sound as a conclusion of abstract law. The words "herein provided for" and "herein referred to" are not the same in meaning, and yet Judge Jackson's *dictum* would make them so. From inquiry of my brethren more familiar than myself with Georgia practice, I am informed that it is not considered at the bar that the act referred to as section 1996 of the Code applies to mortgages.

It seems to me to be clear that the terms of the third section expressly exclude mortgages from the effects of the act. It in effect declares that the first two sections shall not affect mortgages, which are to remain as under existing laws. The remaining sections of the act do not provide for mortgage liens. In fact, taking the act as a whole, it is difficult to see how it in any way provides for mortgage liens. These liens existed before, and unless the last section affects them, nothing has been added and nothing taken away. Every other lien referred to in the act is a statutory lien, and may be said to have been provided for by the act; and the reason for including mortgages in the restriction placed on assignments of liens provided for in the act fails. Every other lien referred to therein results from operation of law, and is likely to be secret and unrecorded, while the mortgage lien is part and parcel of the contract. It is evidenced usually in writing; it is registered; the world has notice of its existence, and that it exists for the purpose of securing the particular debt. The mortgage is given with a view to its assignability; it is part of the contract that it shall be assignable. See 9 Ga. 92. It is not so with statutory liens or privileges, for with regard to the lien or its assignability the parties usually make no contract whatever.

My conclusion is that with regard to the assignment of mortgage liens the law of Georgia does not differ from the general rules of law and equity,



and that, therefore, in this state a transfer by delivery of a promissory note payable to bearer, and secured by mortgage, carries with it the mortgage lien, so that the holder of the note may foreclose the mortgage by suit in equity in his own name, and without making the named mortgagee a party. A decree will therefore go for the complainant in this case.

COANN and others v. ATLANTA COTTON FACTORY Co.\*

(Circuit Court, N. D. Georgia. September, 1882.)

TRUST DEED—EQUITY RULES 47, 48—ABSENT PARTIES.

The Atlanta Cotton Factory Company made a deed of certain property, real and personal, in trust, to certain trustees, to secure to its bondholders the payment of their bonds and interest, with power to take and sell the property in case the company should make default in payment of the interest coupons, and such default should continue for one month, and said trustees should have notice thereof. Subsequently, but at a time when no coupon was due, one of the bondholders brought this suit for himself, and for all parties in interest who might join him, alleging the insolvency of the company, its inability to meet its debts and expenses, and its being about to default in the payment of interest, and had a receiver appointed. Afterwards, several, but not all, of the bondholders, among them one of the trustees, joined the complainant, and, before any default in the payment of interest, a decree was entered ordering a sale, which was had, and the property was purchased by one of the bondholders. The remaining trustees then appeared, and asked to have the sale set aside on the ground of the inadequacy of the price, and that the decree be vacated to enable them, as representing all the first-mortgage bondholders, to be made parties. *Held*—(1) That the relief prayed for must be granted. (2) That the equity rules that allow suits to be brought by some complainants for the benefit of all, expressly reserve the rights of absent parties. Equity Rules 47 and 48. (3) The absent bondholders are not *quasi* parties, as they would have been had the trustees been parties to the suit, and are not bound by the decree. *Campbell v. Railroad Co.* 1 Woods, 377. (4) The purchaser at the sale made, who is also a bondholder and party, takes no full title to what the decree purports to sell. (5) The remedy then given by the decree is not full and complete, even as to the parties before the court, and the litigation is not ended.

*Hopkins, Abbott & Thompson*, for complainants.

*Bleakley, Webb & Davis*, contra.

PARDEE, C. J. On the fifteenth of August, 1878, the defendant executed and delivered to Freeman Clarke, Henry B. Plant, and Vincent R. Tommy, a deed of certain property in Atlanta, Georgia, both real and personal, *in trust*, for the purpose of securing to the holders of the first-mortgage bonds of said company payment of the sum of

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

\$150,000 on October 1, 1883, together with interest thereon at the rate of 10 per cent. per annum, payable quarterly, on the first days of January, April, July, and October, in each year, at the City Bank, New York. It was provided in said deed that if the defendant should fail to pay the interest coupons, or any of them, or the bonds, or any of them, as they became due, and *such default should continue for one month*, such trustees, *when notified of such failure, and that it has continued for one month*, were authorized to take control of the property and to sell the same as therein provided.

On the twenty-fifth of March, 1881, the plaintiff E. T. Coann, as sole complainant, filed his bill, alleging the making of the deed of trust, that he was a holder of 37 first-mortgage bonds of defendant, and that he brought this action on behalf of himself and of the first-mortgage bondholders who might join in the same. Coann further alleged that the defendant was insolvent, and could not pay its debts, as well as running expenses, and the wages of its employes, and that the factory would close, and the employes would scatter, and that it was about to default in the payment of interest due April 1st thereafter. He prayed for the appointment of a receiver, and that *when default occurred in the payment of the interest on the bonds* the deed might be foreclosed and the property sold to pay the first mortgage. Thereupon, by order made and entered March 25, 1881, the court appointed Hon. Rufus B. Bullock as receiver of the property, with directions to carry on the business, collect dues, and *out of the proceeds* pay operatives and other proper expenses, and, further, to make report of his proceedings every rule day.

On April 21, 1881, a petition was filed by the Saco Water-power Company, and on the thirtieth of April, 1881, a petition was filed by the Lewiston Machine Company, asking that the petitioners be made parties complainant to the suit. Each of these petitioners reserved the right to move for another person than Rufus B. Bullock to be made receiver of the defendant's property. On September 27, 1881, a petition was filed by A. V. Clarke, Freeman Clarke, and others, asking to be made parties complainant, who united in the charges and prayers of the bill. A special allegation was as follows: "Said Freeman Clarke is one of the trustees named in the mortgage, and is the holder and owner of 18 of said first-mortgage bonds," etc. On the same day an order was entered in conformity with the petition.

December 10, 1881, an order was entered upon the petition of the receiver, directing him to make and issue negotiable paper for such cotton and supplies as he may find necessary to purchase in carrying

on business, \* \* \* and for money to make such purchases. Final decree was entered in the action March 28, 1882, under which a sale was made by the commissioners therein named on the sixth of July, 1882, and Lemuel Coffin purchased the trust estate for \$101,000, that being the highest sum bid for the property.

By reference to the decree it will be noticed that the trustees, the holders of the legal title of the property, were not made parties to the foreclosure suit, and that only \$122,000 of the first-mortgage bondholders appear on the record. By the affidavits of the two surviving trustees it appears that not only were they not made parties, but they were never requested to take any steps looking to a foreclosure of the property, nor were they ever notified that there was default in the payment of the interest coupons, nor that the interest had remained unpaid for the period of one month.

Freeman Clarke's affidavit shows that he understood the pending proceedings were being carried on, not for the purpose of foreclosure, but for the sole purpose of appointing and continuing Mr. Bullock as receiver. Messrs. Freeman Clarke, E. T. Coann, and A. V. Clarke say they did not know, until after the decree was entered, that a foreclosure suit was in progress. The interest on their first-mortgage bonds was paid up to the first of April, 1882, and the decree herein was entered on the twenty-eighth day of March, 1882, prior to any default upon their large amount of coupons.

No proof appears to have been taken in the cause, and the decree was entered by consent on the twenty-eighth of March, 1882. Apart from the statements in the decree, there is no evidence that any of the coupons were at that time unpaid. Mr. A. V. Clarke and others made arrangements to protect their interests at the sale, but withdrew from these arrangements on learning that the trustees had not been made parties to the foreclosure suit, and that the trustees claimed that the sale would be invalid by reason of their not having been joined as parties. Freeman Clarke refused to join in any effort to bid upon the property, and notified the other first-mortgage bondholders that, in his opinion, the sale of the property in a suit to which the trustees were not parties, would be irregular and void. This position of Mr. Freeman Clarke as a trustee, arising out of a failure to join the trustees as parties, created confusion and uncertainty among the bondholders, and led to the failure of many of them to act in concert for the protection of their rights.

The affidavits of the plaintiffs Coann and A. V. Clarke show that they were both ignorant of the fact that this action was a foreclosure

suit until after the decree of foreclosure was granted. When they were informed of the decree of foreclosure they were advised by counsel that there was doubt about the validity of the title to the mortgaged premises, as the trustees were not made parties, and as some of the bondholders were not parties.

The affidavits of Zephaniah Clarke and C. C. Cornell show that they are holders and owners of first-mortgage bonds of the defendant, and have not been made parties to the suit, and that they knew nothing about these proceedings until after the sale herein; the interest on their bonds having been regularly paid to April 1, 1882.

Mr. Warner's affidavit is much to the same effect, showing his ignorance of a foreclosure suit until after the granting of the decree, and that he took such steps as he could to protect the interests of his clients, the brothers Landauer, who were not made parties to the suit, but that owing to the fact that the title under the sale was questionable, and that the amount of receiver's certificates were unascertained, the bondholders did not make a bid.

Mr. Webb's affidavit shows that the purchasers, on the sale of July 6th, purchased with notice of trustees' rights and claims in the matter; that a large number of the first-mortgage bondholders were not parties to the proceedings; and that, as he is informed and believes, there was no default in the payment of the interest on the bonds.

The mortgaged premises were sold July 6, 1882, for \$101,000, to Samuel H. Coffin, who is one of the firm of Coffin, Altemus & Co., which firm holds first-mortgage bonds to a large extent, and are complainants in suit, and also own the entire issue of \$100,000 of second-mortgage bonds. W. E. McCoy values the mortgaged property at \$200,000; William C. Langley values it at at least \$150,000.

The case comes up at this time on a motion by Freeman Clarke and Henry B. Plant, surviving trustees, made at the term of court at which the decree of sale was rendered, asking that the sale made be set aside for inadequate price, and that the consent decree rendered be vacated to allow them, as representing all the first-mortgage bondholders, to be made parties to allege and prove default in the payment of the interest due on the bonds, and to obtain a decree of foreclosure that will bind and protect all the parties interested in the first-mortgage bonds or the trust estate. A consideration of the entire case satisfies me that this motion should be granted. To reach this conclusion it is not necessary to determine that the proceedings had in the case have been irregular and void.

It may well be that all the persons who have made themselves parties, or who have come in since the sale asking for payment of their bonds, are bound by the decree. And yet it may be said that a close inspection of the pleadings and proceedings had in the case shows that the original bill, giving it its fullest scope, is not one for foreclosure; that it shows no grounds looking to a foreclosure, except the allegation that the mortgagor is going to default; that in only one application of a bondholder to be allowed to join the complainant is there any allegation that there had been default in paying the interest; that only the original bill was notice to the defendant who made no appearance; that the decree *pro confesso* entered against the defendant goes only to the allegations of the original bill; and that there is no proof in the case by confession or otherwise, except affidavit offered on this hearing, that there had been any default or breach of contract that would warrant a decree of foreclosure. Nor is it necessary to determine whether or not all the bondholders, or else the trustees to represent them, must be made parties in order to obtain a valid foreclosure of a trust deed. The law of Georgia which controls the effect of the trust deed which is the foundation of this case, to the effect that "a mortgage is only security for a debt and passes no title," may well make it a vexed question in this state as to how far it may be necessary for trustees of a trust mortgage to be made parties in the foreclosure of the mortgage granted by the trust deed. It is clear that the bondholders who have not been made parties are not bound by the decree.

The equity rules that allow suits to be brought by some complainants for the benefit of all, expressly reserve the rights of absent parties. See Equity Rules 47 and 48. The absent bondholders are not *quasi* parties, as they would have been had the trustees been made parties to the suit. See *Campbell v. Railroad Co.* 1 Woods, 377, 378. It follows that, as the absent bondholders are not bound by the decree, they may inaugurate new proceedings, involving a foreclosure and a review of what has been done. The parties who have joined in this case, but who now insist that the trustees shall be joined, are also in a position to keep the case before the court. The purchaser at the sale made, who is also a bondholder and party, takes no full title to what the decree purports to sell. The remedy, then, given by the decree in this case is not full and complete, even as to the parties before the court, and the litigation is not ended.

The proposition is to open the case, (the proceedings still being *in fieri*,) to allow proper parties to be made, so as to grant full relief and

settle the rights of all parties interested. It also seems clear from the evidence that the apprehensions of some of the bondholders, and their proceedings at the sale, have thrown such a cloud upon the title to be given under the decree rendered as to justify the finding that the price offered at the sale is inadequate. The affidavits filed go to this extent. On this point nothing is left, then, for the court to do but refuse to confirm the sale and set the same aside. That being done, there are no good reasons against, and many good reasons in favor of, vacating the decree to allow new parties to be made, a proper case proved, and a new decree to be rendered, that will do full equity to all parties and end the litigation in the premises. No damage can result but by delay, and no great delay can result, as a new decree can be rendered at this term and the property at once offered for sale. In vacating the decree and allowing new parties to be made, the court can and will make such terms as will result in speeding the cause and procuring a speedy sale of the property.

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CALHOUN and others v. St. Louis & Southeastern Ry. Co.  
(Consolidated) and others.

(Circuit Court, D. Indiana. March, 1880.)

RAILROAD MORTGAGE—FORECLOSURE—PREFERRED CLAIMS.

On a bill filed by the trustees to foreclose a consolidated mortgage, where there had been prior mortgages on different parts of the consolidated road, the net earnings of the road are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and materials furnished; and if, instead of making these payments, the earnings are directed either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced.

In Equity.

Judd & Whitehouse, Bluford Wilson, and Asa & J. E. Iglehart, for complainants.

Scholes & Mather, for defendants.

DRUMMOND, C. J. This was a bill filed in the fall of 1874, by the trustees, to foreclose a consolidated mortgage. There had been prior mortgages on different parts of the consolidated line of road, and the parties interested in those prior mortgages (the bondholders) were made defendants in January, 1876. Pending the litigation, various

parties have filed claims for labor, supplies, and materials. The bondholders interested in the prior mortgages also filed, in 1879, independent bills to foreclose them. A receiver was appointed by the court, who took possession of the property on November 1, 1874, and since then the property has been in the hands of a receiver. The trustees of the consolidated mortgage were also trustees of the prior mortgages. These intervening petitions were for labor and supplies furnished during the year 1874. The claims were referred to a master, who took proof, and has filed a report allowing a large number of the claims; and to the confirmation of that report objections have been made by some of the mortgagees. During that year, and before the receiver took possession of the railway, the company issued certificates of indebtedness, instead of paying the money, and a large portion of the claims consist of these certificates given by the company. There was an order entered by the court, when the bill was filed for the foreclosure of the consolidated mortgage, directing the receiver, out of the net earnings of the road, to pay all certificates of indebtedness and other balances which might be due to the employes of the road, and what might be due for supplies and materials furnished since the first day of January, 1874. It is claimed that this order was entered by the consent of the parties then appearing in the case, and that the parties to the prior mortgages are not bound by this order; but it seems to me that being an order made at the time the court took jurisdiction of the case, the parties then in court were clearly bound by it, and that all parties who came into the litigation afterwards must be considered as coming subject to the policy which had been prescribed by the court in relation to the payment of the labor and supply claims, and if that be not so, then certainly subject to the order as modified by the court at the instance of the first mortgagees. Then it would follow, under the rule of the supreme court in the case of *Fosdick v. Schall*, 99 U. S. 235, the court having a discretion in relation to the appointment of a receiver, and the right to prescribe on what terms the appointment should be made, that the condition then imposed upon the property should adhere to it during the progress of the litigation, and therefore all claims coming within the terms of the order of the court should be paid in the manner there pointed out. But independent of this, as I understand the facts of the case, under the rule which the supreme court laid down in the case already referred to, these claims would be payable out of the net earnings of the road, in consequence either of those earnings having been diverted from the payment for labor performed,

and supplies and materials furnished, to the discharge of a portion of the indebtedness due on the mortgages, or by the appropriation of a part of those earnings to the betterment and permanent improvement of the railway, thus adding to the security of the mortgagees; and therefore, on that account, the amount being sufficient to meet the sum due on these various claims, they should be paid.

I shall, therefore, overrule all objections of that character which have been made to the report of the master, and hold that these claims should be paid, but I shall not allow interest on any of the claims, notwithstanding the certificates may have declared that interest was payable. Where claims have been transferred by the original parties to whom they were due, and the assignees have presented them, I will allow as valid claims only what has been paid for the claims thus transferred. The master was of the opinion that the fair inference from the testimony was that these claims arose out of work done for, or supplies and materials furnished to, the railway in Illinois and Indiana, and I cannot say that in this case this is necessarily erroneous. This was a contract made by the company after the lien of the mortgages had operated on the road, and was, of course, subject to the rights of the mortgagees, and, as has been frequently held in a case like this, there must be some sacrifice made by all parties—the employes and the material men on the one side, and the mortgagees on the other. Notwithstanding the ability of the arguments which have been made by the counsel for the mortgagees, they do not affect the view which I have always taken of these claims, nor are they able to withdraw this case from the principles which the supreme court has established, which are that the net earnings of the road are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and materials furnished, and that if, instead of making these payments, the earnings are diverted either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced.

See *Turner v. I., B. & W. Ry. Co.* 8 Biss. 527.



**COIT v. NORTH CAROLINA GOLD AMALGAMATING Co. and others.\***

(Circuit Court, E. D. Pennsylvania. October 7, 1882.)

**1. CORPORATION—UNPAID INSTALLMENTS ON STOCK—RIGHT OF CREDITOR TO INQUIRE AS TO CONSIDERATION PAID FOR STOCK.**

While unpaid installments on stock ordinarily constitute a trust fund for the payment of the corporate debts, yet where stock has been issued to a stockholder and settled for by him under an arrangement made in good faith with the company, it is not in the power of a creditor, in all cases and as a matter of right, to institute an inquiry as to the value of the consideration given for the stock, and disturb the arrangement so made.

**2. SAME—SUBSCRIPTION IN PROPERTY.**

Where the capital subscribed is settled for by the transfer to the corporation of personal property belonging to the subscribers, at an honest valuation fairly made and agreed upon between them, they cannot be held individually liable to creditors because the value of the property, estimated in the light of subsequent events, will not equal the amount at which it was received.

**3. SAME—KNOWLEDGE OF CREDITOR.**

And even where, upon the purchase of additional property, the capital has been increased by the issue and distribution of new stock to a much larger extent than the cost or value of the additional property, the stockholders cannot be held individually liable at the suit of a creditor who was cognizant of the whole transaction and acquiesced in it.

**Hearing on Bill, Answer, and Proofs.**

This was a bill filed by a judgment creditor of a corporation against the corporation and its stockholders for a decree for the payment by the stockholders of his debt. The material facts were as follows:

In January, 1874, a number of persons who had been carrying on mining operations under the name of "The North Carolina Gold Amalgamating Company," applied for and obtained a charter of incorporation under the same name. The charter provided for minimum capital of \$100,000, divided into 1,000 shares of \$100 each, with power to increase the capital to \$2,500,000, or 2,500 shares. The charter further provided: "The subscription to the capital stock of said company shall and may be paid in such installments, and in such manner and such property, real or personal, as a majority of the corporators may determine." The \$100,000 capital was subscribed as follows: The corporators met and separate valuations were made by them of certain personal property owned by the association, the average valuation being \$137,000. It was then agreed that the property should be estimated at \$100,000, and shares of stock issued therefor and divided among the corporators in proportion to their interests. In the valuation was included a supposed value of the charter, but it appeared that without this there was over \$100,000 worth of property at the valuations made by the corporators.

Some time after this, negotiations were commenced for the purchase of land on which the company was operating, which resulted in an arrangement with

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.  
Affirmed. See 7 Sup. Ct. Rep. 231.

the owner by which the land was converted into capital of the company, and the capital was increased to \$1,000,000, or 10,000 shares of \$100 each, of which the personal property of the corporation was to represent 4,000 shares, the land 2,000 shares, and the residue held for sale to procure money to carry on the operations of the company. This arrangement was carried out, and 4,000 of the new shares were issued to the stockholders upon the surrender of their old certificates. The complainant, Coit, was the holder of a second mortgage on the land purchased, and under an arrangement with the company he surrendered his old mortgage and took obligations of the company secured by a new mortgage.

Some time after the purchase the title to the land was disputed by new claimants, and a new arrangement was made, by which the stockholders surrendered the new stock which had been issued to them, and retained only the \$100,000 originally issued.

It was claimed on behalf of complainant that both the original valuation of the property of the association and the valuation of the land purchased were fraudulent, and that only a small part of the \$100,000 original capital had ever been actually contributed. On the other hand, the respondents claimed that the valuation of the company's property had been made *bona fide*, and that the arrangement for the purchase of the real estate and increase of stock had been made with the knowledge and acquiescence of complainant.

*George Biddle, Edward F. Hoffman, and Charles Hart*, for complainant.

*Pierce Archer and Richard C. McMurtrie*, for the gold company and certain stockholders.

*H. T. Fenton, L. R. Fletcher, William A. Husband, Thomas H. Neilson, W. H. Smith, George Bull, W. C. Bullitt, and George Junkin*, for stockholders.

BRADLEY, Justice, (*orally*.) The case of *Coit v. North Carolina Gold Amalgamating Co. et al.* has received our consideration, and we are now prepared to announce an opinion. Complainant's counsel have, by a very fair presentation of authorities, based the claim against the stockholders upon the doctrine that the capital stock of a corporation is a trust fund which is liable for the claims of creditors, and the general proposition cannot of course be controverted; that is to say, it is liable after a corporation becomes insolvent. Prior to its insolvency a corporation holds its property as any other person, not in trust, but absolutely in the exercise of direct dominion and supreme control. But when a corporation becomes insolvent, then, according to the holding of courts of equity, its property becomes a trust fund for the payment of creditors. This is true, at all events, in cases where the property has not been subjected to execution, or disposed

of by way of assignment or other appropriation to particular debts. But the principles upon which that trust is administered are not so simple as might at first be supposed. The trust embraces all the property of a corporation; embraces its real estate and its choses in action. If debts are due to the corporation they are part of that fund, and may be collected by the proper representative of the corporation, whether a trustee appointed by a court of equity, an assignee in bankruptcy, or other agent, for the parties interested. But it is only those claims or assets which a company has that belong to the trust fund. Unpaid installments on stock in the ordinary case are assets; they are claims which a company could enforce, and therefore they are claims which the creditors can compel the enforcement of through the instrumentality of a court of equity.

But there are cases in which arrangements have been made for the payment of stock which preclude the company itself from enforcing any further payment thereon, and yet in which, as to creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, the courts will impose a trust upon the subscription, and set aside the arrangement made for its payment. But that trust does not arise absolutely in every case where capital stock has been issued, and where it has been settled for by arrangement with the company. It is not as if the stockholders had given their promissory notes for the amount, those notes being in the treasury of the company; but there are often equities to which the stockholders are entitled,—on which they are entitled to stand.

I suppose that in the case of stock dividends fairly made, in consideration of profits earned, and of accumulations of the property of the company,—made simply to represent the property, and fairly representing the same,—dividends made of stock as full-paid stock, without any dishonest purpose, without any purpose to deceive or defraud anybody,—I suppose that in a case of that kind a court of chancery would have no power to revive a claim against the stockholders because they had not advanced actual cash for the shares. There are considerations, therefore, affecting this question of liability for stock on which money has not been actually paid, which must be taken into consideration in order to do justice. It is not true that it is in the power of a creditor in every case, and in all cases, as a mere matter of right, to institute an inquiry as to valuation of the amount of the consideration given for the stock, and disturb fair arrangements for its payment in other ways than by cash. If the stock has been

fairly created and paid for, there is an end of trusts in favor of anybody; and this does not affect the general proposition that unpaid subscriptions of stock are a trust fund to be administered for the benefit of creditors after a corporation becomes insolvent.

Now, in looking at the present case, as to the first thousand shares of stock, it seems to us manifest, from the evidence in the case, that the company—the associates who formed the company—regarded, and, so far as we can see, honestly regarded their plant—the property that they contributed—as worth the hundred thousand dollars for the amount of which stock was issued. They estimated some things as property which could not in law be regarded as such. The valuation of the charter as such was improper; it was improperly placed as a part of the capital stock of the company. The value of the charter could not form any item whatever in constituting its capital stock. But, as has been shown, dismissing that out of the case, there was still a valuation, as made by all the parties, which exceeded the hundred thousand dollars. We think, therefore, that corporators, in such a case as that, ought not to be made liable individually for the debts of the company, at the instance of creditors, because now, at a later day, the estimates fairly put upon the property at that time have become modified by subsequent events, and will not amount to the value which they set upon it. This does not assume that they have a right to fix any value they please; they must put an honest value, and, so far as the evidence in this case is concerned, we are brought to the conclusion that they did fix an honest value, to what they put into the concern. Certainly the corporation had no claim, and could have maintained none, against the corporators for this original subscription.

As to the new stock that was issued in May or June, 1874, it appears that the object of issuing the 4,000 shares as a dividend to the stockholders was to balance the amount of stock given to Howes for his land. They said: "Yes, we will give you 2,000 shares of stock for the land, provided it is balanced by 4,000 shares to the company, including the 1,000 shares already held. In other words, when that property is put into our concern we will give you one-third interest in the whole, 2,000 shares out of 6,000." (Of course, the other 4,000 belonging to them was to be sold to other parties.) Whereas, if they had given him 2,000 shares of stock without any such adjustment, it would have been giving him for his land two-thirds instead of one-third of the whole property of the company; that is, of the whole capital stock of the company. This they were

unwilling to do. Now it is true that they might have arranged that matter in a different way. They might have said: "We will give you 500 shares of additional stock for your land; then you will stand one-third to two-thirds—then you will have half as much stock as we." But that was probably not satisfactory to him. They entered into the agreement; they had conversed about it; they had talked it over; and he wanted a larger nominal amount, and they said: "If you have a larger nominal amount it must be balanced by more stock." That is evidently the nature of the transaction. I do not see any evidence of any intent to defraud anybody in such a transaction as that.

But there is the public. Have they not some rights if you make such a transaction as that? Certainly. And after that stock was increased to 6,000 shares, and 4,000 shares had been assigned to the associates in lieu of their 1,000 shares, there is no doubt that all the creditors becoming such after that time, and fairly to be presumed as calculating upon the amount of capital which the company was announced as having, must be held entitled to enforce the doctrine of the courts with regard to trusts. They did not advance any money for the additional 3,000 shares received, and they would probably be held bound as to such creditors to pay the amount of their stock. But even then, if it could be shown that this property was really worth 6,000 shares of stock, which was issued for it, there would be a question, there being no fraud and the stock representing only its value in property, whether they could be held liable. Still the evidence that it was not of that value, arising from the fact that Howes took 2,000 shares for the property acquired, would probably be conclusive that it was not, but that the arrangement was merely one of adjustment. But does that rule, with regard to holding the stockholders liable for the amount of these new shares, hold with regard to all the creditors of the company? Does it hold with regard to a party who is cognizant of the whole arrangement; who knows all about it, and who knows that the stock is issued as a dividend? Does it hold with regard to such a party, who receives a novation of his debt—of an old debt—and receives the same security for it that he had before? It seems to us that this would be unjust; that it would be a fraud on the stockholders, and not on the creditor.

We have looked at the evidence to see whether Mr. Coit, the plaintiff, was cognizant of the transaction and of its character, and we are brought to the conclusion that he was; that he knew all about it. He had his son there as an agent on the ground all the time, and had his superintendent there, who knew all about it, and we find that the

resolution for increasing the stock, which was undoubtedly passed after previous verbal communications between the parties, was passed on the eleventh day of May, 1874, authorizing the directors to issue the stock for the purpose of making this arrangement, and on the 18th, at an adjourned meeting, the directors passed their resolution to that effect. Then on the twentieth of May—right along in the same period—an agreement was entered into with Howes, for the purchase of his land, reciting the whole transaction; reciting that the previous mortgages—Coit's among the rest—were to stand as before, only Coit's to be surrendered and renewed. Then, on the twenty-sixth of May, part of the same transaction, comes the agreement with Coit that he will surrender his mortgage and take a new one, and give up the stock of the old company. That agreement is carried out on the twenty-sixth of July afterwards by his executing deeds to the company, and by their executing to him a mortgage. In the mean time, the stock that was to be issued was issued. The first certificate is dated July 3, 1874. It was during the latter half of May, and in June, that this whole transaction was going on. If a legal presumption did not arise that Mr. Coit knew of the transaction at that time, and there was no proof that he knew of it, it would present a different case. But we have evidence that he did know. Now what is that evidence? We have the evidence of Gen. Cram, who says, when asked to explain the connection of Mr. Coit with the company: "When the company purchased the Gold Hill mining estate of Howes, the company gave acceptances to Howes in part payment; one amounting to \$1,000, payable in some months. This was transferred by Howes to Coit. At the time he purchased, Coit had held a second mortgage. In the terms for the purchase it was agreed between the company and Coit that Coit shall cancel his old mortgage and take a new one." And so on. Then Mr. Mitchell, who was intimately connected with the matter, says that Mr. Coit was perfectly familiar with all the transactions. "Mr. Coit was perfectly familiar with the original formation of the company, and with the increase of the stock of the company to \$1,000,000; he was a party to it, and the company could not, and would not, have purchased the Gold Hill property and increased its stock without his concurrence and consent. Mr. Coit, both personally and through his agent, was made acquainted with the designs, purposes, and intentions of the company in the purchase agreement. The agreement with him was to that effect; that he was to be placed afterwards in the same position," etc.

Now, unless this evidence is rebutted,—and Mr. Coit does not come forward to contradict it in the slightest degree,—unless this evidence is rebutted,—it seems to us perfectly clear that the conclusion must be deduced that Mr. Coit knew of this whole transaction, and acquiesced in it; and since he received the same security he had before, and perhaps an additional security,—because the agreement between him and the company says that he was to have all their new property, new buildings, etc., and the Mansion House,—how can he complain of the issue of the stock? Under these circumstances, to make the stock, or the supposed subscriptions to the stock,—for the counsel is right in saying that stock issued to a party, which he receives, is the same as though he subscribed for it,—to make the stockholders liable personally to Mr. Coit, on the ground that it became a trust fund for his benefit, would be, instead of promoting justice, promoting injustice. It would enable Mr. Coit, by a mere trick of the law, to take money out of the pockets of these men which he never expected or relied on.

In deciding cases like this we must look into the nature of the transaction, the mutual relations of the parties, and the general habits of the business community in reference to transactions of this kind. We must not put strained and forced constructions upon the acts of parties which will promote the ends of injustice rather than those of justice. We are therefore brought to the conclusion on the whole case (and there is evidence to which we have not adverted) that this bill cannot be sustained, but must be dismissed.

We have thus merely indicated, in a conversational way, the general line of thought upon which we have based our conclusion, and have not thought it necessary to advert to other considerations tending in the same direction, such as the fact that the title to the land purchased of Howes could not be perfected, and the issue of new stock was revoked, and the parties reinstated to their original shares.

Bill dismissed.

## BABBITT v. DOTTEN.

(Circuit Court, N. D. Illinois. May 11, 1882.)

## 1. EQUITY—FRAUD—EVIDENCE.

Allegations of fraud should always be clearly proved, either directly or necessarily, by circumstances which clearly lead the mind of the court to the conclusion that a fraud has been perpetrated; and as the allegations of fraud in this case are not clearly made out, the bill must be dismissed.

## 2. SAME—DISMISSAL OF BILL.

Where a bill in equity is founded on alleged fraudulent business transactions, and the evidence fails to sustain the charge, the bill must be dismissed, though it appears that defendant owes debts growing out of the business as to which the fraud is alleged.

*Charles Lawrence*, for plaintiff.

*F. W. Becker*, for defendant.

DRUMMOND, C. J. In 1868, Dotten, the defendant, entered into the employment of the plaintiff, acting as his agent in the distribution and sale of soaps in the north-western states. He had at that time a fixed compensation of so much a day, which, in 1869, was increased; and when an office, in 1870, was furnished to the defendant, Dotten, at Chicago, he still continued as the agent of the plaintiff at a further increased compensation per day. Dotten made sales of the soap, collected the money due, paid the freight and various expenses, and made remittances from time to time to the plaintiff of the proceeds of the sales. There was also a mode adopted by the parties of advertising the quality and value of the soap which the plaintiff had for sale by making a distribution of it gratuitously at houses, and in different cities and towns of the north-west. The bill alleges that Dotten, in the transaction of business connected with his agency, was guilty of various fraudulent acts, by which the plaintiff was cheated out of the money that was actually due him. After Dotten had become the agent of the plaintiff he formed a partnership with the other two defendants, Smith and Sherwood, in what is termed "the veneer business," and the bill alleges that there was a fraudulent conspiracy by all the defendants to deprive the plaintiff of what was due to him, and that the firm of J. Willard Smith & Co. was used for the purpose of effectually carrying out the object of this conspiracy. It will be seen, therefore, the *gravamen* of the bill throughout consists of fraudulent transactions on the part of Dotten, and of the other defendants in connection with him. If the questions in this case were whether Dotten, the defendant, was indebted to the plaintiff as



his agent because he had not paid over all that was due to him, and whether an account should be taken for the purpose of accomplishing that object, there would not, perhaps, be much difficulty in reaching a conclusion; but the ground upon which application is made to a court of equity in this case is that of fraud, and not that Dotten has had and received money of the plaintiff which he ought to pay over to him.

The litigation is of long standing, and when the bill was filed an application was made to the court for the appointment of a receiver to take possession of the individual and partnership goods of the defendants, who was accordingly appointed by the court and took possession of the property, and it was sold apparently at a sacrifice, its administration having been attended with great, and, it would seem, rather unnecessary, expense. It may be stated at the outset that there does not appear to be sufficient evidence to connect Smith or Sherwood with any conspiracy with Dotten to defraud the plaintiff, and as to them the bill must be dismissed.

The main difficulty arises as to the character of the different transactions of Dotten with the plaintiff. It is charged that he has not accounted for the value of all the soap he sold, and the proceeds of which were received by him, after deducting the necessary expenses and his compensation. I am inclined to think that this proposition, under the evidence, is sound, and that it states the true legal relation of the parties to each other; but the question is whether, in the change which took place as to that part of the business, there was a fraud perpetrated by Dotten for the purpose of cheating the plaintiff. The goods were furnished by the plaintiff to the defendant, and the shipments made upon bills or invoices which were sent at the time the goods were forwarded. The defendant claims that, from the manner in which this part of the business was transacted between him and the plaintiff, an agreement was made under which he was only accountable to the plaintiff for the goods at the prices named in the bills forwarded; and there can be no doubt there is much in the testimony to justify this view. Accounts were furnished by him upon this basis, and there was also much in the conduct of the plaintiff, or the agents who were acting for him, tending to show an acquiescence in this mode of transacting the business and of stating the accounts; and it is unquestionable that, when this method was adopted by the defendant, the distinct statement was not made, as perhaps it should have been, reminding Dotten of the original basis upon which the parties stood to each other, and that he was simply an agent employed to sell goods at a fixed rate of compensation per day. For example, it

might have been said that there was no particular object in stating the value of the goods, so far as Dotten was concerned, or for any other purpose than simply to let him know what the cost of the goods was; and that did not affect, in any degree, his rate of compensation; but that had been already a matter of adjustment and settlement, which had not been changed. So that, conceding, as I think the weight of the evidence establishes, that Dotten continued to be employed at a fixed daily compensation, still I cannot say that it clearly makes out, in this part of the case, that this change in the mode of rendering the accounts, and fixing the compensation of the defendant, was fraudulent on his part. He may possibly have considered that, owing to the great increase of business and of the sales created by his labors and exertions, he was entitled to a higher compensation than the *per diem* allowed him by the original contract, and that he would state the account in a different form from that which was authorized by their contract, for the purpose of ascertaining whether the plaintiff would acquiesce in it; and, in any event, it was competent for the plaintiff or his agents to protest at once and decidedly as to this mode of stating the accounts, and it was not done as early and as clearly as it ought to have been.

It is charged, also, that fraud was practiced in the distribution of what is termed in the evidence "Give-Away Soap;" that is to say, that the amount of soap distributed for the purpose of advertising its quality was really much less than was contained in the account rendered by Dotten. It is almost impossible to arrive at the truth, in the conflict of evidence upon this point, amid the vagueness with which the different statements are made by the witnesses. Undoubtedly there was great opportunity for a misstatement as to the quantity of soap thus actually distributed, if the defendant was engaged in fraudulent practices; but it must be remembered that the very character of the business was such as to create great difficulty in ascertaining with entire accuracy what the distribution in this way actually was. Many men had to be employed. There is some evidence tending to show that these agents thus employed did not always act faithfully in the distribution of the soap, but there does not seem to be any connection, clearly proved, even if this be so, of Dotten with this supposed unfaithfulness on the part of the agents.

It may be admitted that there are several circumstances shown in the evidence which are of a somewhat suspicious character. It was unfortunate that Dotten, while employed as the agent of the plaintiff, should have formed a copartnership in another kind of business with

Smith and Sherwood. Even admitting that he did not take an active part in the business of the firm, still, the natural effect was to divert his attention somewhat from the business of his agency for Babbitt, and it was a great mistake, to say the least, that, as the agent of Babbitt, he made the firm of J. Willard Smith & Co. his financial agents, depositing money with them, which apparently was mingled with the money of the firm, and drawing checks on their funds for the payment of the expenses growing out of this agency. This, of itself, was calculated to create suspicion on the part of the plaintiff, but it does not affirmatively appear from the evidence that there was anything fraudulent in this, either on the part of Dotten, or of Smith or Sherwood; and it does not appear that the plaintiff was directly a loser by this mode of transacting the business.

One of the difficulties connected with this case is that many of the witnesses testified under the influence of strong feeling, and with a bias which may be presumed to color more or less the character of their testimony. There is something in the manner in which Dotten himself gives his evidence which is not entirely satisfactory. It may be, however, the result of the exceptionally strong feeling he had in the case. A quarrel had sprung up between him and one of the principal witnesses of the plaintiff, which may be presumed to affect, to a greater or less extent, the testimony of the latter; and then there was a criminal prosecution against Dotten, founded on the alleged frauds set forth in the bill in this case, which was ultimately unsuccessful, and which has undoubtedly aggravated the feelings of the parties and witnesses, and is calculated to impair, more or less, the effect of the statements made by many of them. The result of the whole matter is that the allegations of fraud are not made out so clearly as they should be in order to entitle the plaintiff to a decree. Allegations of fraud should always be clearly proved, either directly or necessarily, by circumstances which clearly lead the mind of the court to the conclusion that a fraud has been perpetrated.

Growing out of the main controversy in this case there have been presented several claims against the firm of J. Willard Smith & Co., viz.: Graham, Dorsett & Co., for \$629.95; that of J. C. Scott & Co., \$215.53; and the Sewing Machine Cabinet Company, \$396.07. These claims seem to be established as valid claims against the company; and as the receiver took possession of all the property of the company, and it has been sold, there seems to be no good reason why these claims should not be paid out of the funds which came into the hands of the receiver.

## WACKERLE v. MUTUAL LIFE INS. CO.\*

(Circuit Court, E. D. Missouri. October 30, 1882.)

1. LIFE INSURANCE—BURDEN OF PROOF.

In an action by a wife on the policy of insurance taken out on her husband's life, the burden of proof is on the plaintiff to prove the death of her husband and her right to recover.

2. IDENTITY OF PERSON—PROVINCE OF JURY.

Where a witness was called who represented himself to be the husband of the plaintiff, while the plaintiff denied that he was her husband, and the witness was ignorant of many circumstances in the life of the person whom he personated, and the testimony adduced in support of his identity was conflicting, it is the peculiar province of the jury to decide the question of identity from all the evidence adduced.

3. SAME—WEIGHT OF EVIDENCE.

Where there is a vast conflict of testimony, in which there is a question of identity to be established, it is for the jury first to consider which witnesses had the best opportunity and were most likely to know the facts, and second, to give to those witnesses whose long acquaintance and special opportunities were such as to enable them to carry in their recollection the identity of the particular party, greater weight than those who only casually knew the party.

4. SAME—CONCLUSIVENESS OF VERDICT.

Where the court alluded to and commented on the evidence sharply against plaintiff's claim so far as identity depended on the exhumed skeleton of the party alleged to have been her husband, and the jury reached the conclusion that it was the skeleton of her husband, killed in a railroad accident as alleged, and that the witness representing himself to be her husband was not what he pretended, which was their exclusive province, the court will not interfere with the verdict.

This was a suit to recover money alleged to be due by the terms of a policy of insurance upon the life of William Wackerle, deceased, issued by defendant for the benefit of plaintiff, his wife; and also to recover a premium paid by plaintiff to defendant by mistake, after the assured's death. The defendant in its answer denied that the terms of the policy had been complied with by the plaintiff, and denied also that the assured was dead. The case was tried before a jury. The testimony was very conflicting. The plaintiff introduced evidence tending to prove that her husband, the assured, had been killed by a railroad accident, and that in ignorance of his death she had subsequently paid a premium to defendant. The defendant thereupon placed a witness upon the stand who swore that he was William Wackerle, the plaintiff's husband, whose life had been insured by the policy sued upon. It was also shown that he had in the

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

character of William Wackerle drawn several thousand dollars from the United States treasury in pensions. But this witness proved upon examination to be ignorant of a number of important events in the life of the real William Wackerle, such as his wife's having given birth to child on the night she and her husband arrived from Sacramento, California, at Quincy, Illinois, and the fact that William Wackerle was in Cincinnati in the year 1869 and at another time in Marshall, Texas. The witness was also ignorant as to the age, sex, place of birth or burial of five out of eight children he said the plaintiff had borne to him.

The evidence was also conflicting as to other points, which need not be here detailed.

TREAT, D. J., (*charging jury.*) You have been detained here for a considerable length of time on a case somewhat peculiar in its character, the solution of which must depend almost entirely on you; in other words, the main question at issue is a simple question of fact, of which jurors are by law the sole judges. This is a suit on a policy issued January 24, 1867, in which the party whose life was insured is described as a resident of Milwaukee, and a laborer. The policy was issued on the life of the husband for the benefit of the wife. She contends that her husband was killed December 25, 1872, in Louisiana, near Shreveport, and on that hypothesis she offered to the company proof of loss—that is, the required proof under the policy—that he was dead on February 4, 1873. On January 24, 1873, she paid the premium,—\$131.44,—also on the hypothesis that he was not then dead, or, if dead, the fact of his death was unknown to her; so that, if the result of your verdict is that the plaintiff in this case is entitled to recover, she will recover the \$4,000 insurance, with interest from March 6, 1873. The loss was payable six months after proof was made, and that, by my computation, would bring it to March 6, 1873; and as to the payment of \$131.44, of course no interest should run against that until the company was informed or notified that death had previously occurred.

For the purposes of this case, if you find for the plaintiff, you will compute interest on the \$4,000 and on the \$131.44 from March 6, 1873. Now, the question of fact is a very difficult one, in which you can receive little or no aid from the court; but it may not be improper for the court to direct your attention in a very general way to such matters as may aid you in the analysis of the testimony. Bear in mind that the loss is alleged to have occurred on the twenty-fifth of December, 1872. Bear in mind, also, the circumstances and facts

connected with the death of the particular person there, and whether the facts substantiate his identity—not in name only, but in person—as the husband of the plaintiff here. If my memory serves me correctly with regard to this testimony, there was something in the nature of an epidemic at that time at Shreveport, whereby a great many persons dying were buried in the Potter's field, and among them persons killed on the railroad. Now, what was the nature of that accident? If it be, as some witness suggested who was familiar with the accident, that his leg was crushed just above the knee, you will have then an *indicia* or mark to guide you in the further progress of the case; and also this broken tooth, on the other hand. It appears from the testimony of plaintiff that this tooth, about which there seems to be no special difficulty, seems to have been lost and disappeared from the husband of this plaintiff prior to that period of time.

It seems this body was exhumed twice,—the first time with reference to the suit then pending, and long after the death. The body could be recognized only by such marks as would not be likely to disappear after interment for a long period of time. The broken tooth and fragment of a garment seemed to be the main reliances on the one hand for identification; and on the other hand, on the second exhumation, an unbroken leg and no bones crushed at all. Hence, as to the purposes of identity there, and as to what occurred when the bodies were exhumed, the question arises, was this the man killed by the railroad? You will have to determine with regard to these matters, bearing in mind this doctor's statement—Dr. Moore, I think, is the man—that in exhuming the body he found the leg bones entire. Hence, you will encounter at the very outset that difficulty. If, however, you think that the weight of testimony with regard to that matter is with the plaintiff,—for it is for the plaintiff always to prove her case, the burden being on the plaintiff in all cases,—if you reach the conclusion that the person killed was the person exhumed, the next step in the inquiry is, was the person killed and exhumed the husband of this lady? Now you will look very carefully into all the incidents connected with the affairs down there to ascertain that matter, in connection, of course, with what other testimony has been offered. The lady herself testifies that the person produced here upon the stand, claiming to be her husband, is not, while he, on the other hand, testifies that he is, her husband.

Now, there is a vast deal of testimony presented here from various portions of the country. Some witnesses here say that they know William Wackerle, who was the husband in the old country; that

they were boys together, and they renewed their acquaintance in this country. There were others who did not know him in the old country, but knew the family, both this lady and her husband, up in Carver county, where, it may be presumed, and I think the testimony shows, about 70 families resided at that time, and nearly every one living there a pioneer life knew every one else. Then you have the testimony of those two persons in California. You have, on the other hand, the testimony of witnesses in Carver county ignoring or negating, according to the statements of those witnesses the alleged fact that this William Wackerle was the husband. You have this testimony from Quincy—Dr. Bassett and those other gentlemen who knew him there. Now, in such a vast conflict of testimony, in which there is a question of personal identity to be established, it would seem that the mode of solving it would be, first, (supposing all parties testifying equally upright and desirous of only telling strictly the truth,) what witnesses had the best opportunity and were most likely to know the facts, and giving to such persons whose long acquaintance and whose special opportunities were such as to enable them to carry in their recollection distinctly the identity of a particular party, greater weight than those who only casually knew him, and who consequently might not, from having nothing particular to impress upon their memory the appearance of the man, remember him as distinctly, and giving to the latter less weight. Begin at the occurrence in Louisiana first; ascertain whether the person killed was the husband of this lady; next, whether the person exhumed was the person killed; then examine the testimony that has been produced here from various persons, who allege that they know this is the husband—some testifying that he is the husband, and some saying that they do not recognize him, though they did know the husband when he lived in Carver county.

Now, the court cannot aid you any further, gentlemen, in regard to this matter. I can only direct your attention to these salient matters, and you alone can solve the questions involved.

You will have to take the case, gentlemen, as it is, to ascertain whether the husband of this lady died, as contended, from a railroad accident on the twenty-fifth of December, 1873, or whether, on the other hand, he was not then killed, but is still alive. That is all there is in the case, as far as the court is concerned

The jury retired, and, after a not very long conference, brought in a verdict in favor of plaintiff for \$6,300 on the policy for \$4,000, including interest, and for \$206.99 on the payment of premium by the

plaintiff after the death of her husband, including interest. There was subsequently a remittance entered by plaintiff of \$300, and the court rendered judgment for the remainder, \$6,206.99.

Whereupon the defendant moved the court to set aside the verdict and judgment, and grant a new trial of the case for the following reasons, to-wit:

"(1) Because the verdict is against law; (2) because the verdict is against the evidence; (3) because the verdict is against the weight of evidence; (4) because the verdict is so repugnant to the evidence in the case as to indicate prejudice and passion in the jury against the defendant, and of mere favor towards the plaintiff; (5) because there was no evidence in the cause of the death of the insured, William Wackerle; (6) the court erred in charging the jury that they were sole judges of the issues in the cause."

*A. R. Taylor*, for plaintiff.

*Glover & Shipley*, for defendant.

TREAT, D. J. A full examination has been made of the evidence, which was one peculiarly for a jury. It was on both sides full of doubts, inconsistencies, and contradictions. Turn as we may in the analysis of the evidence, strange and irreconcilable aspects are presented. The first point to be established by plaintiff was the death of her husband. That rested on the testimony of several witnesses concerning the railroad accident, and the identity of the person killed thereby.

The evidence of the plaintiff and others as to the skeleton exhumed some four or more years after such killing, establishes to the satisfaction of the court that the exhumed skeleton was not that of the man killed, supposed to be William Wackerle, on December 25, 1872. The court directed the attention of the jury especially to that fact. Not that it was conclusive, but because it tended to show what weight should be given to other testimony. It may be that the exhumed skeleton was not that of William Wackerle, and hence the accuracy of plaintiff's testimony became questionable. Yet there was other evidence as to the death of the party killed, independent of the exhumation in 1877. It was therefore for the jury to decide whether, despite the mistakes as to the identity of the skeleton, William Wackerle was killed as alleged.

The case as presented by the evidence was remarkable in many other aspects, concerning which it is useless to comment. There are several depositions wanting which the court has been anxious to read and analyze, but by some accident they have disappeared. Hence the court has to rely on its memory as to their contents, and if



a new trial is granted the plaintiff after a long lapse of time [cannot be required] to supply the same.

So far as the court was justified in alluding to or commenting on the evidence, it pointed in its charge sharply against the plaintiff's claim, so far as identity depended on the exhumed skeleton. Still, the jury reached the conclusion that the plaintiff's husband was killed in 1872, as alleged, and consequently that the person produced by the defendant, and claiming to be the William Wackerle, (husband of the plaintiff,) was not what he pretended.

The case was tried at great length, and the largest scope given to a searching inquiry. Its novel aspects induced the court to admit every item of testimony which could shed light on the subject.

After full deliberation on the varied, inconsistent, and contradictory evidence, the jury reached a conclusion which was their exclusive province, and the court does not feel justified in interfering therewith. The motion for a new trial is overruled.

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*In re* STATE INS. CO.

(Circuit Court, N. D. Illinois. June 14, 1882.)

**BANKRUPTCY—LIABILITY OF STOCKHOLDERS—ASSETS.**

On January 12, 1871, a corporation, by adoption of a by-law, reduced to \$500,000 its original stock of \$10,000,000, on which 24 per cent. had been paid in by stockholders, canceled the outstanding certificates of stock, and issued full-paid certificates for 20 per cent. of the canceled certificates. Afterwards the company became insolvent, and the stockholders were resorted to in order to pay its creditors. *Held*, that the stockholders, on the twelfth of January, 1871, in case the assets of the company were not sufficient to pay its debts, were liable for all claims on contracts *at that date* in force, but were not liable on *subsequent* contracts, and as to subsequent contracts the creditors could only look to other assets of the company; but that if the subsequent creditors of the company could not be paid in full out of the general assets, the stockholders must pay in full all claims on contracts existing January 12, 1871, and refund to the assignee any amount realized from the assets and by him applied in payment of such contracts; and as the assignee had paid 40 per cent. on these contracts out of the assets of the company, the stockholders must restore this amount to the general fund.

*J. Van Arman and F. J. Smith*, for petitioner.

*B. D. Magruder and Goudy & Chandler*, for defendant.

DRUMMOND, C. J. Since an opinion was given upon this case, some further arguments have been presented by both sides, and the case

has been further considered. The controversy is in relation to an order made by the district court on July 8, 1880, which declared that every person who was a holder of unpaid or partially-paid stock, in the company on the twelfth day of January, 1871, was liable for the amount then remaining unpaid upon such shares of stock, in such sum as was necessary to pay the debts of the company which had accrued, or might thereafter accrue, upon all policies of insurance issued by the company prior to that day; and an order making an assessment of  $12\frac{1}{2}$  per cent.; and an order declaring that those stockholders who, within 60 days, should pay to the assignee \$10 per share of the stock, were entitled to receive a receipt in full of all their assessments, and be forever discharged from all liability. On the twelfth day of January, 1871, at an annual meeting of the stockholders of the company, a resolution was unanimously passed by which the capital stock of the company was reduced to \$500,000, it having been originally fixed at \$10,000,000, upon which there had been 24 per cent. paid; 20 per cent. originally, and 4 per cent. having been added as an assessment levied to make good the impairment of the capital stock. The resolution of the twelfth of January, 1871, adopted as a by-law, declared that the outstanding certificate of stock should be canceled, and full-paid certificates for 20 per cent. of the canceled certificates issued.

The company became insolvent, and it was necessary to resort to the stockholders in order to pay the creditors of the company. The district court held, and in that opinion this court concurred, that the reduction of the stock did not relieve those who were stockholders at the time from their liability on the contracts then existing against the company, but that the stockholders to whom the full-paid stock was issued were not liable individually on contracts made after January 12, 1871.

The main controversy in the case grows out of the fact that the assignee has paid to the various creditors about 40 per cent. of the claims which have been proved, including the claims on contracts existing at the time the stock was reduced. No part of this 40 per cent., however, came from the stockholders whose stock had been reduced, and to whom full-paid stock had been issued, but from other assets of the company. It would seem upon principle that in the case of the insolvency of a company like this, that all its assets and all liability of the stockholders for the payment of the debts ought to be used for that purpose. In other words, that all obligations ought to be met and discharged in order to pay the debts of the com-

pany. The company was then in this position: The stockholders, on the twelfth of January, 1871, in case the assets of the company were not sufficient to pay its debts, were liable for all claims on contracts at that time in force. They were not liable on subsequent contracts. For these latter, therefore, the creditors could only look to other assets of the company. As at the time the assignee distributed the 40 per cent. to the creditors it could not be known to what extent a call would have to be made on the stockholders, it would seem that it was proper to make the distribution generally to all the creditors, but it must be regarded as a conditional distribution, subject to correction upon the collection of all the assets of the company, and upon the payment of all liabilities of the stockholders. But now it is ascertained that the stockholders must be called upon to meet an existing deficiency, and we have to take the case, therefore, upon the basis that a portion of the claims arising on contracts in force on the twelfth of January, 1871, have been paid with other assets of the company.

It is urged that the stockholders stand in the position of sureties to pay the debts of the company. It is, perhaps, not material what term we apply to them. Whatever is legally due from them constitutes a fund for the payment of the debts of the company. Their liability is undoubtedly secondary, namely, on default of the assets of the company not being sufficient to liquidate the claims against it. If the stockholders, on the twelfth of January, 1871, are relieved in part from their liability because some of the debts against them have been paid by other assets of the company, then they are to that extent discharged from their legal obligations, which, we have seen, were to the full extent of all debts accruing upon contracts at that time in force; that is, they would be in part released from the claims against them because the assignee, from the general assets of the company, has paid 40 per cent. to the creditors. In case the subsequent creditors of the company cannot be fully paid out of the general assets, the question is whether the stockholders can thus be partially released from their obligations, and whether, on the contrary, they should not be compelled to pay all that was due; and if their creditors have received anything from other assets of the company, that amount should not be restored to the general fund from payments to be made by the stockholders of the twelfth of January, 1871. It seems to me that, in such a case, they must discharge all their obligations,—they must pay the amount in full to meet their claims on contracts existing at that time, and, of course, including an

amount sufficient to restore to the general fund what has been taken from it; and therefore, I think, there should be an order of the district court made requiring the stockholders to pay enough to meet all liabilities on contracts existing on the twelfth of January, 1871.

The 12½ per cent. assessed by the district court was ordered on reports made by the register, to whom various questions connected with this branch of the case were referred. He stated that the liability against the company on the twelfth of January, 1871, on claims proved, was the sum of \$164,502.38, which he said had been reduced by the payment of the 40 per cent., as already stated. The 40 per cent. paid on these claims amounted to \$50,379.36; and it appears by his report, and by the admission of the petitioners in an amendment which they have filed to their petition, that a portion of the original debt has been expunged, thus reducing the amount due. In view of the various circumstances which have occurred since the order was entered by the district court, it may be a question whether this court should direct the district court to make an assessment on the stockholders for any definite amount, or simply to instruct it to make an assessment sufficient to pay all the liability existing on the part of the stockholders for the debts due on the contract in force January 12, 1871, without crediting upon those debts the 40 per cent. that has been paid by the assignee. The order of the district court will, therefore, necessarily have to be changed, as it appears to have been made upon the assumption that the \$50,379.36 was to be deducted from the amount specially due by the stockholders.

It is, perhaps, only fair to state that the question which has been discussed in this court and now decided, does not seem to have been presented to the district court at the time the order was made which is now the subject of review.

Subsequently the district court was directed to make an assessment of 25 per cent.; it appearing that amount would be necessary to meet the deficiency.

## DALLINGER v. RAPELLO.

(Circuit Court, D. Massachusetts. October 18, 1882.)

TAXATION—PERSONAL PROPERTY OF NON-RESIDENTS—EXECUTOR—MASS. GEN. ST. c. 12, § 20.

Personal property of a deceased inhabitant of Massachusetts is not taxable under Gen. St. c. 12, § 20, after the appointment of an executor and before distribution, when the property is not within the commonwealth, and neither the executor, nor any person having an interest in or right to receive the property, has a domicile or residence there.

Action of contract, brought in the superior court for the county of Middlesex and commonwealth of Massachusetts, under Gen. St. c. 12, § 20, by the collector of taxes of the city of Cambridge, against the executor of the will of Francis Sumner, to recover taxes assessed upon the defendant by the assessors of that city. The declaration alleged that Sumner, who last dwelt in Cambridge, died in February, 1878, leaving a large taxable estate in personal property, and a will, which was duly admitted to probate in the county of Middlesex, and the defendant there appointed executor, in February, 1879; that the defendant proceeded to act as such executor, and had never given notice to the assessors of Cambridge that the estate had been distributed and paid to the parties interested therein; that the taxes sought to be recovered were assessed upon the defendant, as such executor, on the first days of May in 1879, 1880, and 1881, respectively; that in August of each year a warrant for their collection was duly committed by the assessors to the plaintiff, and he demanded payment of the defendant, but the defendant wholly refused to pay the taxes or any part thereof; whereby the defendant owed the plaintiff the amount of the taxes. The defendant, having removed the case into this court, demurred to the declaration, because it set forth no legal cause of action substantially in accordance with the rules contained in the practice act of Massachusetts, and because it did not allege that the defendant, at the times of the assessments of the taxes upon him, was an inhabitant of Massachusetts, or of any city or town therein.

*L. S. Dabney*, for defendant.

*J. W. Hammond*, for plaintiff.

Before GRAY and LOWELL, JJ.

GRAY, Justice. The declaration does not allege that the testator left, or that his executor holds, any personal property situated within the commonwealth of Massachusetts, or taxable therein, or that the

executor, or any legatee, distributee, or creditor is an inhabitant thereof. The allegation that the taxes were "duly assessed" shows only that they were assessed in proper form. And the final allegation, that the defendant owes the plaintiff the amount of the taxes, is a mere conclusion of law, which is not admitted by the demurrer. The taxes sued for are not of the nature of legacy or succession taxes, as in the cases of *Mager v. Grima*, 8 How. 490, and of *U. S. v. Hunnewell*, decided by this court at the present term.<sup>1</sup> But they are annual taxes, assessed under the general tax acts of Massachusetts. The case, therefore, directly presents the question whether personal property of a deceased inhabitant of Massachusetts is taxable, under those acts, after the appointment of an executor, and before distribution, when the property is not within the commonwealth, and neither the executor, nor any person having an interest in or right to receive the property, has a domicile or residence here. This question does not appear to have been decided by the supreme judicial court of Massachusetts. But the rules established by the constitution and the statutes of the commonwealth, as expounded by that court, afford satisfactory guides for its determination.

The power conferred by the constitution upon the legislature is "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within, the said commonwealth. Const. Mass. c. 1, § 1, art. 4. And no case has been brought to our notice in which personal property, not itself within the state, and the present owners of which do not reside within the state, has been held to be taxable here. The right to tax is created and limited by the constitution, and by the acts passed by the legislature pursuant to the authority thereby conferred; and such acts are not to be extended by doubtful interpretation, but are to be restricted to cases coming clearly within their language and their intent. *Sewall v. Jones*, 9 Pick. 412, 414; *Green v. Holway*, 101 Mass. 243, 248. When the owner of the legal title in personal property resides out of the state, express and unequivocal words are needed to subject the property, even if itself situated or used here, to the provisions of the general tax acts. *Flanders v. Cross*, 10 Cush. 514; *Dorr v. Boston*, 6 Gray, 131; *Leonard v. New Bedford*, 16 Gray, 292.

By Gen. St. c. 11, § 12, it is enacted that "all personal estate, within or without the state, shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May, except as

follows." The first and third clauses of this section, providing for the taxation of stock in trade in the place in which it is employed, and of horses and cattle in the place in which they are kept, other than where the owners reside, carefully adds the words "whether such owners reside within or without this state." The second clause of the same section, which contains no such words, but which directs "all machinery employed in any branch of manufactures, and belonging to a person or corporation," to be assessed where it is situated or employed, and the value of such machinery owned by corporations to be deducted from the value of the shares, before assessing a tax on these to the stockholders, has been adjudged to have no application to a corporation established in another state. *Blackstone Manuf'g Co. v. Blackstone*, 13 Gray, 488; *Dwight v. Boston*, 12 Allen, 316. In the case of personal property of persons under guardianship, provision is made by the fourth clause for taxing it at the home of the ward, and if that is without the state, then to the guardian at his own home,—clearly implying that when both reside abroad the property is not taxable in this state, even if situated here. So, by the fifth clause, personal property held in trust by an executor, administrator, or trustee, the income of which is payable to another person, can only be taxed at the residence of the trustee or at the residence of the *cestui que trust*; if both reside within the state, to the trustee at the residence of the *cestui que trust*; if only one of them resides within the state, to that one in the place where he resides. See, also, *Hardy v. Yarmouth*, 6 Allen, 277.

The seventh clause of Gen. St. c. 11, § 12, provides as follows:

"The personal estate of deceased persons shall be assessed in the place where the deceased last dwelt. After the appointment of an executor or administrator, it shall be assessed to such executor or administrator until he gives notice to the assessors that the estate has been distributed and paid over to the parties interested therein. Before such appointment, it shall be assessed in general terms to the estate of the deceased."

And by the further provisions of this clause, and of section 20 of chapter 12, (under which this action is brought,) the executor or administrator is liable, in an action of contract, as well for the taxes so assessed before his appointment, as for those assessed upon him afterwards. By the statute of 1878, c. 189, § 2, personal property held by an executor or administrator is taxable according to the provisions of Gen. St. c. 11, § 12, cl. 7, for the space of three years after his appointment, unless it has been distributed, and notice of its distribution has been given to the assessors, "stating the names, resi-

dence, and the amount paid to the several parties interested in the estate who are residents of the commonwealth;" and after the three years the property, whether it has been distributed or not, is to be assessed according to the provisions of Gen. St. c. 11, § 12, cl. 5.

It is argued by the learned counsel for the plaintiff that until the property is distributed, or until three years after the appointment of the executor have elapsed, the property is to be treated as situated in the place in which its late owner resided, and in which the executor is required by law to account for it. But upon deliberate consideration of the seventh clause of chapter 11, § 12, of the General Statutes, in connection with the other provisions of the same chapter, we are unable to find any evidence that the legislature, in framing this clause, contemplated a case in which the property is itself out of the state, and is held by an executor or administrator residing out of the state. The provision, first introduced in those statutes, permitting the tax, before the appointment of an executor or administrator, to be assessed generally to the estate of the deceased where he last dwelt, appears to have been intended to prevent the personal property from escaping taxation altogether before such appointment, and not to extend the liability of the executor or administrator for taxes assessed after his appointment. See *Cook v. Leland*, 5 Pick. 236; *Wood v. Torrey*, 97 Mass. 321. And it is so contrary to the policy of the commonwealth, as declared by its constitution, and by the decisions of its highest court, to impose a tax on personal property which has an owner, and which is not itself situated or used within the state, and in which no person residing here has either legal title or beneficial interest, that we cannot infer an intention to do so without more explicit words in the tax act. This view being decisive of the case, it is unnecessary to consider the graver question, argued at the bar, whether it is within the constitutional power of the legislature to impose an annual tax under such circumstances.

Demurrer sustained.

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**TAXATION OF NON-RESIDENTS.** Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within its jurisdiction. (a) The power of the state as to the mode, form, and extent of taxation is unlimited where the subjects of taxation are within its jurisdiction. (b) While revenue laws have no extraterritorial force, they may reach

(a) State Tax on Foreign Held Bonds, 15 Wall. 300.

(b) State Tax on Foreign Held Bonds, 15 Wall. 319; *Oliver v. Washington Mills*, 11 Allen, 265.



all property within the state, without reference to the residence of the owner.(c) The state may provide for the taxation of the personal property of a non-resident situated within its jurisdiction.(d) An alien may be taxed as well as a citizen.(e) The right to tax a person results from the protection afforded to himself, his business, or his property.(f) Personal property of a non-resident, which has a *locus* within the state, is taxable.(g) A statute taxing "all personal property," means all personal property within the state, irrespective of ownership,(h) as a herd of cattle, a flock of sheep, or a stock of goods.(i) The real estate of a non-resident is taxable where it is located.(j) Personalty owned by a non-resident is taxable where he resides.(k) A personal tax cannot be assessed against a non-resident.(l) Non-residents may be taxed on property where situated, and on business where carried on.(m) A statute which provides that non-residents "doing business" in the state shall be taxed on sums invested "in business," does not apply to a manufactured article sent for sale by the agent.(n) The business of a non-resident carried on within the state may be taxed.(o) A private banker, for the purposes of taxation, is to be regarded as resident where the bank is located.(p) Members of a partnership are severally taxable where they reside.(q)

**SITUS OF PERSONAL PROPERTY.** Debts due to a non-resident are not property of the debtor, and have no *situs* but the residence of the owner.(r) A person cannot be assessed on capital invested in another state, or on chattels upon land in another state.(s) So the personal property of a non-resident is not taxable at his temporary summer residence within the state.(t) Stocks of a foreign corporation follow the *situs* of the owner.(u) Shares of stock in corporations may be taxed at the place where the business is carried on.(v) Steam-boats which ply between different points on a navigable river may, under a state statute, be taxed as personal property where the company own-

(c) *Arapahoe Co. v. Cutter*, 3 Colo. 350.

(d) *Green v. Van Buskirk*, 7 Wall. 150; *People v. Ins. Co.* 29 Cal. 533; *Mills v. Thornton*, 26 Ill. 200; *Rieman v. Shepard*, 27 Ind. 288; *State v. Falkenburg*, 15 N. J. 320; *Howell v. State*, 3 Gill, 14; *Blackstone Manuf'g Co. v. Blackstone*, 13 Gray, 438; *Leonard v. New Bedford*, 16 Gray, 292; *Hartland v. Church*, 47 Me. 163; *Desmond v. Machias*, 48 Me. 478; *St. Louis v. Ferry Co.* 40 Me. 580; *Hoyt v. Com'rs*, 23 N. Y. 224; *People v. Ogdensburg*, 48 N. Y. 330; *Wilson v. New York*, 4 E. D. Smith, 675; *Hood's Estate*, 21 Pa. St. 114; *Maltby v. Reading R. Co.* 52 Pa. St. 140; *Steere v. Walling*, 7 R. I. 317; *Catlin v. Hull*, 21 Vt. 152.

(e) *Witherspoon v. Duncan*, 4 Wall. 210.

(f) *De Pauw v. New Albany*, 22 Ind. 204; *Bank of U. S. v. State*, 12 Smedes & M. 456; *Eggleston v. Charleston*, 1 Const. S. C. 45.

(g) *Arapahoe Co. v. Cutter*, 3 Colo. 350; *Catlin v. Hull*, 21 Vt. 152; *Duer v. Small*, 17 How. Pr. 201.

(h) *McCutchen v. Rice Co.* 2 McCrary, 337; *Ogilvie v. Crawford Co.* 2 McCrary, 148.

(i) *Arapahoe Co. v. Cutter*, 3 Colo. 350.

(j) *Witherspoon v. Duncan*, 4 Wall. 210; *Jones v. Columbus*, 25 Ga. 610; *Turner v. Burlington*, 16 Mass. 208.

(k) *Com. v. Hays*, 8 B. Mon. 2.

(l) *Herriman v. Stowers*, 43 Me. 497; *Dow v. Sudbury*, 5 Mete. 73; *St. Paul v. Merritt*, 7 Minn. 258; *People v. Sup'rs*, 11 N. Y. 663.

(m) *Corfield v. Coryell*, 4 Wash. C. C. 380; *Padelford v. The Mayor*, 14 Ga. 438; *Pearce v. Augusta*, 37 Ga. 597; *Harrison v. Vicksburg*, 3 Smedes & M. 581; *Worth v. Fayetteville*, 1 Winst. 70; *State v. Charleston*, 2 Speers, 623; *Shriver v. Pittsburgh*, 66 Pa. St. 446.

(n) *Parker Mills v. Com'rs*, 23 N. Y. 242.

(o) *Corfield v. Coryell*, 4 Wash. C. C. 371; *Padelford v. Savannah*, 14 Ga. 438; *Pearce v. Augusta*, 37 Ga. 597; *Harrison v. Vicksburg*, 3 Smedes & M. 581; *State v. Charleston*, 2 Speers, 623; *Shriver v. Pittsburgh*, 66 Pa. St. 446; *Worth v. Fayetteville*, 1 Winst. 70.

(p) *Bates v. Mobile*, 46 Ala. 158; *Miner v. Fredonia*, 27 N. Y. 155; *Gardner, etc., Co. v. Gardner*, 5 Me. 133.

(q) *Bemis v. Boston*, 14 Allen, 366. See *Hoadley v. Com'rs*, 105 Mass. 519.

(r) *Arapahoe Co. v. Cutter*, 3 Colo. 350.

(s) *People v. Com'rs*, 23 N. Y. 224.

(t) *Phelps v. Thurston*, 47 Conn. 477.

(u) *McKeen v. Northampton Co.* 49 Pa. St. 519; *Whitsell v. Northampton Co.* Id. 526.

(v) *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490.

ing it has its principal office.(w) Ferry-boats owned in another state are not taxable.(x) A vessel registered in New York and plying between Panama and San Francisco is not taxable in California.(y)

**TRUST PROPERTY.** Property held in trust should be assessed to the trustee where he resides.(z) If there are two trustees, one-half may be assessed to each.(a) without regard to the *cestui que trusts*.(b) Where one executor resides within the state and transacts business pertaining to the estate, and the other resides abroad, the residence of the former determines the *situs* of the choses in action belonging to the estate.(c) Trust property under direction of the court is taxable in the jurisdiction having control of it.(d) An assessment against the personalty of an estate may be made a personal charge against the executor or guardian.(e) As to personalty of distributees of an estate in the hands of a trustee.(f) Money due on a land contract in the hands of an agent is taxable.(g)

**INTANGIBLE PROPERTY.** Intangible property, not growing out of real estate, follows the person of the owner.(h) Where the domicile of the owner of choses in action upon which taxes were paid (under protest) was in another state, they do not constitute property within this state, and are not subject to taxation here.(i) Although the *situs* of real estate, by which debts are secured, is within the state, the trust deeds are mere incidents—choses in actions attached to the owner.(j) The *situs* of a bond is the residence of the owner, wherever the obligor may reside.(k) Its locality does not depend upon the place of the written evidence of the ownership.(l) So of a promissory note secured by a bond deed.(m)

**PROPERTY IN TRANSIT.** A state cannot levy a tax upon property in transit to other states.(n) Such property has no *situs* in the state, in the proper legal sense of that word.(o) The personal property of one who had been a resident of the state, but who was *in itinere*, on the day for the levy of taxes, for the purpose of removing to another state, is subject to taxation.(p) One who has left the town of his residence without the intention of returning, is, nevertheless, taxable there, while he remains in the commonwealth, until he has

(w) Transp. Co. v. Wheting, 99 U. S. 273.

(x) St. Louis v. Ferry Co. 11 Wall. 423; Morgan v. Parham, 16 Wall. 471.

(y) Hays v. Pacific M. S. Co. 17 How. 596; State v. Haight, 30 N. J. 423; People v. Com'rs, 11 Alb. Law J. 401.

(z) Hardy v. Yarmouth, 6 Allen, 277; Baltimore v. Sterling, 29 Md. 48; People v. Assessors, 40 N. Y. 154; State v. Matthews, 10 Ohio St. 437; Carlisle v. Marshall, 36 Pa. St. 397.

(a) State v. Matthews, 10 Ohio St. 437; Baltimore v. Sterling, 29 Md. 48.

(b) People v. Assessors, 40 N. Y. 154.

(c) Johnson v. Oregon City, 3 Or. 13.

(d) Lewis v. Chester Co. 60 Pa. St. 325.

(e) Williams v. Holden, 4 Wend. 223; Payson v. Tufts, 13 Mass. 493.

(f) See U. S. v. Hunnewell, 13 Fed. Rep. 617, 618, note.

(g) People v. Ogdensburg, 48 N. Y. 330; Sup'rs v. Davenport, 40 Ill. 197.

(h) Johnson v. Oregon City, 3 Or. 13.

(i) Railroad Co. v. Pennsylvania, 15 Wall. 300; Davenport City v. Mississippi & M. R. R. Co. 12 Iowa, 539; Augusta City v. Dunbar, 50 Ga. 393; People v. Eastman, 25 Cal. 601; Hayne v. Dellesselline, 3 McCord, 373; Johnson v. Lexington City, 14 B. Mon. 521; Arapahoe Co. v. Cutter, 3 Colo. 349.

(j) Arapahoe Co. v. Cutter, 3 Colo. 350.

(k) Hayne v. Dellesselline, 3 McCord, 374; Augusta v. Dunbar, 50 Ga. 357. See Harper v. Com'rs, 23 Ga. 566; Bridges v. Griffin, 33 Ga. 113.

(l) Johnson v. Oregon City, 3 Or. 13.

(m) Arapahoe Co. v. Cutter, 3 Colo. 349.

(n) McCutcheon v. Rice Co. 2 McCrary, 337.

(o) McCutcheon v. Rice Co. 2 McCrary, 337.

(p) McCutcheon v. Rice Co. 2 McCrary, 337.

acquired another residence.(q) Residence is presumed to continue until a change is affirmatively shown.(r) Where a town taxes a party as a resident, the burden of proof of residence is on the town if questioned.(s)—[ED.

(q) *Bulkley v. Williamstown*, 3 Gray, 493.  
(r) *In re Nichols*, 54 N. Y. 62.

(s) *Hurlburt v. Green*, 41 Vt. 490; S. C. 42 Vt. 316.

### SINGER ROCKING-CHAIR CO. v. TOBEY FURNITURE CO.

(Circuit Court, N. D. Illinois. August 4, 1882.)

#### PATENTS FOR INVENTIONS—ROCKING-CHAIRS—MERE MECHANICAL CHANGE.

A rocking-chair constructed to move upon a stationary platform, having a base or rails upon which the rockers move, the base being tongued and the rockers grooved so that one fits into the other, the ends of the base being elevated, to prevent the rockers from working off, with flexible rubber bands connecting the rockers to the rails of the stand to prevent the seat from moving back and forth on the rails, or rocking too far either way, is a mere mechanical change from chairs in previous use, and in such a device there is nothing that can be the subject of a patent.

*Banning & Banning and C. K. Ofield*, for plaintiff.

*Coburn & Thatcher*, for defendant.

DRUMMOND, C. J. There are nine suits by the same plaintiff against different defendants, two of which have been brought in the circuit court of the United States for the eastern district of Wisconsin, and the remaining suits in this court. They are all founded on alleged infringements of a patent to Charles Singer, July 6, 1869, for an improvement in the construction of rocking-chairs. The patent contains two claims. The second relates to a device by which a current of air is produced, which, by the act of rocking, is impelled through a flexible tube so as to be carried to any part of the person seated in the chair. That claim is not in controversy here and need not be further considered. The rocking-chair is one constructed to move upon a stationary platform, and not upon the floor. The platform has a base or rail upon which the rockers move, the latter being curved in the usual form. The base or rail is tongued, and the bottom of the rockers grooved so that the one fits into the other, and the ends of the base (or rails, as the patent calls them) are elevated so as to prevent the rockers from working off. The base or rails are A shaped, or of other form, upon which the rockers are fitted; the latter being provided with V grooves, or otherwise adapted to the rail, and

projecting but a short distance below the seat. If it be intended that the rails are grooved and the rockers tongued, there would be no difference in the principle. The specification alleges: "The rockers may be connected to the rails of the stand by flexible bands, in passing over studs projecting from the sides of each, to prevent the seat from moving back and forth on the rails, or rocking too far either way. These bands may be slipped off the studs when the chair is to be taken apart for packing." The first claim, which is the only one said to be infringed, is as follows: "The stand, A, having rails, B, the seat, c', and rockers, C, fitted to the said rails, and the elastic bands, M, combined and arranged substantially as specified."

Having thus stated in what that part of the Singer machine consists which is the subject of controversy here, the question naturally presents itself, in what respect it was new and the subject of a patent.

The movement of a rocking-chair on a stationary platform, instead of rockers moving on the floor, was not the invention of Singer. That device had been used before. In a general sense it was contained in the patent of Samuel Simmons, of December 21, 1819, and particularly in the patent of Samuel H. Bean, of March 31, 1840. Bean states that the principal feature of his invention consisted in making the seat (and stool, as he calls it) of the chair in two parts, so that while the stool remains stationary the seat was made to rock on rockers. The base or rail on which the rockers moved in *his* chair were smooth, but there was a flange on the *outside* of each rocker similar to that on the inside of a railroad car-wheel, and which he calls guards, which prevented the seat from having any lateral movement. There were certain hanging metallic plates whose upper ends were suspended from the inside of the seat frame by pins, the object of which was to prevent the seat from being thrown off the stool. Without referring now to some of the other patented improved rocking-chairs which have been set up by the defense, it is clear that Singer found a platform or stool, with a chair on rockers moving on the rails or base of the stool, with flanges on one side of the rockers to prevent lateral displacement, and also with a device to prevent the seat and the rockers from being thrown off the stool. Now, what did he add to or change as to this part of his patent? He tongued the rails or base, and elevated them at the ends, and grooved the rockers, instead of making flanges on the outside of each, thus fitting the rockers to the rails or base, and he attached an elastic band to the platform on each side of the stand. With a rocker attached to an ordinary chair, moving on

a rail or platform base, as existed in Bean's chair, tonguing and grooving the rocker and the base, and elevating the latter at each end, would seem to be no more than a mere mechanical change. In that case all that is left would be simply the fact that an elastic vertical band is attached to the two parts of the structure to prevent the chair from being thrown off the platform; and the elastic band is nothing more than a mechanical device to accomplish the object named. But in any view of the subject it seems clear that the patent, if it could be sustained for the particular manner in which the chair is constructed, namely: "The stand, A, having rails, B, the seat, c', and rockers, C, fitted to the said rail; and the elastic bands, M, combined and arranged as specified;" then the chairs constructed by the defendants do not come within the specific descriptions here contained, and so would not infringe the plaintiff's patent. But we prefer to place our opinion upon broader grounds, and to say that, fairly construing the device here in question, as set forth in the specifications, there was nothing in it that entitled Singer to a patent.

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DAMON & BIHN v. EASTWICK.\*

(Circuit Court, E. D. Pennsylvania. October 23, 1882.)

PATENT—PRIORITY—EMPLOYEE.

One who is the first discoverer of a process is entitled to a patent therefor, even against one in whose employ he was at the time of the discovery, and at whose request and expense he was making experiments which led to the discovery

Hearing on Bill, Answer, and Proofs.

This was a suit between parties who had respectively made application for a patent for the "manufacture of sulphate of alumina." The commissioner decided in favor of the present respondent, whereupon the complainant filed this bill. After the filing of the bill, letters patent No. 239,089 were duly issued by the commissioner to the respondent. The facts are sufficiently set forth in the opinion.

*F. T. Chambers* and *George Harding*, for complainant.

*Baldwin, Hollingsworth & Fraley*, for respondent.

BUTLER, D. J. In the year 1880 the complainants and respondent, respectively, made application for letters patent for improvements in

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

the manufacture of sulphate of alumina or aluminous cake, involving the same invention. The commissioner, after the usual hearing and examination, decided in favor of the respondent, to whom letters were accordingly issued. The complainants have filed this bill to obtain the benefit of a review, in the light, not only of the evidence before the commissioner, but also of that taken here. The respondent challenges the court's jurisdiction, as well as the claim to priority of invention. As our judgment is with the respondent on the second point, and the bill must therefore be dismissed, the former may be passed by.

Little need be said in passing on the question of priority. In January, 1878, the respondent discovered that aluminous cake, of superior quality, may be obtained from halloysite, by the process described in his patent. This process consists in mixing ground halloysite, sulphuric acid, and hydrate of alumina, in the manner and proportions stated in the specifications, whereby a high degree of heat is generated by chemical action, producing ebullition, the halloysite rapidly decomposed, the fine particles of silica thus liberated infused throughout the entire mass, resulting in a uniform homogeneous cake. It is unnecessary to review the prior state of the art, or recount the complainants' experiments in the direction of this discovery. Mr. Damon was president of the Pennsylvania Salt Company, whose business, in part, was the manufacture of aluminous cake. Having been tendered the purchase of extensive halloysite beds in Indiana, he was anxious to ascertain how this mineral could be profitably employed. Experiments were accordingly made, which satisfied him and his company, that it was valuable for the manufacture of aluminous cake, and they bought it in the fall of 1877. It is quite clear, however, that the experiments were incomplete, and the process subsequently patented had not then been discovered. Eastwick and Bihn were the company's chemists, and it was in the further prosecution of the experiments by Mr. Eastwick, at Mr. Damon's request, that the patented process was developed. All previous efforts had fallen short. That halloysite can be dissolved by sulphuric acid, and the resultant cake rendered neutral by the addition of hydrate of alumina, had been ascertained. But this was insufficient even to suggest the subsequent discovery,—which was not simply that halloysite may be thus dissolved and hydrate of alumina employed as a neutralizing agent, but a process whereby a high degree of heat is generated, the action of the sulphuric acid accelerated, and the decomposition and final result greatly improved,—mainly by the em-

ployment of other properties of the hydrate of alumina. That the respondent was the first discoverer of this process does not seem at first to have been doubted. His proposition to obtain letters patent was, to say the least, not discouraged by Mr. Damon, who was aware of it; and the counter-claim of Damon & Bihn does not appear to have been suggested until the respondent declined to transfer his rights to the salt company.

As remarked at the outset, the only question requiring our consideration is that of priority. The justice or injustice of the respondent's taxing the salt company, if he proposes to do so, for the use of a process disclosed by experiments made at its request and expense, with its material, while in its employment, we cannot enter upon.

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### WEIR v. NORTH CHICAGO ROLLING MILL Co.

(Circuit Court, N. D. Illinois. October, 1880.)

#### PATENTS FOR INVENTIONS—DEVIATION.

In reducing his patent to practical application a patentee is not held to strictly and entirely follow the mere mechanical device shown in his drawings, but he may deviate so long as he does not violate the principle involved in his patent.

In Equity.

*J. H. Raymond*, for complainant.

*George Willard*, for defendant.

BLODGETT, D. J. The complainant's device differs from the Pulver patent by the addition of stationary comb-grates, as he calls them, which operate with the rocker-grates. The Purchase patent shows a series of rocker-grates, each of which is rocked or tilted independently of the others; and the end rocker has grate-bars only on one side of the rocker-shaft, the shaft lying close to the end of the fire-box, and so constructed, with an eccentric upon the side next to the wall of the fire-box, that it can only tilt the grate-bars upward. For all practical purposes the grate-bars in the end shafts are stationary when the shaft is not itself rocked. The bars of the shaft next this end shaft engage and operate with those of the end shaft precisely in the same manner as in the Rounds grate.

I have here a model of the Rounds grate, showing the comb-grates at the ends of the fire-box, and the rocking-grate bars engaging

through them. The mode of operation is simply rocking or tilting the rocker-grates.

The model of the Purchase grate shows a series of rocker-grates, each moving independently by itself, and when you rock one of these, leaving the end of the grate stationary, as it is stationary except for an upward motion caused by an eccentric upon the bar, it is fixed, as far as any downward motion is concerned. By rocking this, precisely the same result is produced as in rocking Rounds' grate. You rock the teeth upon this rocker-bar, mashing them in between the teeth of the fixed grate, precisely as in the operation of the Rounds grate.

It is true, coal or cinders may accumulate upon the shafting which rests against the wall, forming, as it does, a ledge or shelf; but it does not affect the principle involved, which is that of one set of tilting grate-bars matching with a fixed or stationary set. In my opinion it was not invention, but only an act of mere mechanical skill or adaptation, after the steps in the art taken by Purchase, to make a grate with fixed or stationary bars at the ends, between which the rocking-bars could pass or match. It seems to me Purchase would have had the right, in applying his device to practical use, to have dispensed with his end rocking-shaft, and fixed his end grate-bars rigidly to the ends of the fire-box, so there would have been no material deviation from the operation shown in his device.

It seems to me there can be no doubt but what Purchase, after he had obtained this patent, could have said, "The rocking of this grate up and down is of no special practical importance; I will simply make the end bars fixed and rigid in the end of the fire-box, and rock the teeth of the next bar between those;" and it would have been one of those modifications of his device which would have been allowable under the patent, because no patentee is held, in reducing his patent to application, to strictly and entirely follow the mere mechanical device shown in his drawings of the patent. He may deviate, so long as he does not violate the principle involved.

The bill in this case is therefore dismissed, with costs.



*In re* GEORGE MONCAN, *alias* AH WAH, and another.

(Circuit Court, D. Oregon. October 27, 1882.)

1. TOUCHING AT A PORT OF THE UNITED STATES.

A vessel touches at a port of the United States, within the meaning of section 3 of the act of May 6, 1882, to exclude Chinese laborers from the United States, when she calls there for orders, or a cargo for a foreign port, and Chinese laborers who are on board of her as passengers or crew, are not unlawfully in the country, contrary to said act, during her stay for such purpose.

2. CHINESE CREWS.

The act aforesaid does not apply to Chinese who enter a port of the United States as seamen or members of the crew of a vessel arriving from a foreign port with the intention of returning or proceeding to another foreign port in the ordinary course of commerce and navigation; but if such Chinese leave the vessel while in the American port, or do not depart with her, their presence in the country becomes unlawful.

3. THE DECK OF AN AMERICAN VESSEL IS AMERICAN TERRITORY.

A person on board of a vessel of the United States or any one or them is in contemplation of law within the territory and jurisdiction of the United States, and therefore a Chinese laborer who shipped on an American vessel at London, prior to the passage of the act aforesaid, and continued on her until her arrival in the United States, although after the expiration of the 90 days next following the passage of said act, is entitled to reside therein.

*James F. Watson*, for the United States.

*M. W. Feckheimer*, for defendants.

DEADY, D. J. On October 25, 1882, Ah Kee and George Moncan, *alias* Ah Wah, were brought before me on warrants issued by me under section 12 of the act of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," upon the charge of being unlawfully within the United States, contrary to section 1 of said act. Upon the hearing the following facts were established and admitted:

On February 18, 1882, Moncan joined the American ship *Patrician* at London as cook, and on March 9th signed the articles for a voyage thereon in that capacity to Cardiff, and from thence on a general trading and freighting voyage, as the master might direct, not exceeding 24 months in duration, and back to a port of discharge in Europe or the United States; that the vessel went to Yokohama, Japan, where, on September 11th, in consequence of the steward, Ah Sing, being discharged, Moncan was made steward, and Ah Kee shipped as cook for a voyage to Astoria, Oregon, or for orders, and thence to such ports as the master might direct, not exceeding 24 months in duration; that on October 14th the *Patrician* entered the Columbia river, and arrived at this port on October 24th, with Moncan and Ah Kee on board as steward and cook, respectively, where they remained until removed upon the warrants issued for their arrest. Both Moncan and Ah Kee are natives of China, and were duly shipped before the American consuls of London and Yokohama,

respectively. The *Patrician* belongs at Damariscotta, Maine, and is now loading with wheat for Europe, and will be ready to sail in a few days; and the master, unless prevented, expects to carry these men with him for the voyage specified in the articles.

Section 1 of the act of May 6, 1882, declares that upon the expiration of 90 days from its passage, and for a period of 10 years thereafter, "the coming of Chinese *laborers* to the United States" is suspended; and that "during such suspension it shall not be lawful for any Chinese *laborer* to come, or having so come, after the expiration of said 90 days, to remain within the United States."

By section 2 it is made a misdemeanor, punishable by a fine and imprisonment, for the master of any vessel "to knowingly bring within the United States on such vessel, and land, or permit to be landed, any Chinese *laborer* from any foreign port or place."

From the operation of these two sections the third one excepts Chinese laborers who were in the United States on November 17, 1880, or who might come therein within the 90 days next after the passage of the act; and also the case of any master bound to a foreign port whose vessel shall come within the United States "by reason of being in distress, or in stress of weather, or *touching* at any port of the United States on its voyage to any foreign port or place: provided, that all Chinese laborers brought on such vessel shall depart with the vessel on leaving port."

Section 12 provides "that any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the president of the United States and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to remain in the United States."

This act was passed in pursuance of the treaty with China of November, 1880, supplementary to that of July 28, 1868. Pub. Treaties, 148. By the former the right conceded to the Chinese by the latter to come to and reside within the United States at pleasure was modified so as to authorize the government of the United States, whenever in its opinion "the coming of Chinese *laborers* to the United States or residence therein affects or threatens to affect the interests of the country, to regulate, limit, or suspend the same;" but such limitation or suspension shall be reasonable, and shall apply only to *Chinese who may go to the United States as laborers*, other classes not being included in the limitations. It is not to be presumed that con-

gress, in the passage, of this act intended to trench upon the treaty of 1868 as modified by that of 1880; and therefore it is that all general or ambiguous clauses or phrases contained in the former should be construed and applied so as to make them conform to the latter. It is manifest that the concession in the supplementary treaty of 1880 was only asked and obtained by the United States for the purpose of allowing it to limit or suspend the existing right of Chinese laborers to come and be within its territory, for the purpose of laboring therein and thereby competing with the labor of its citizens for the local means of livelihood.

Counsel for the Chinese contends (1) that under the circumstances the *Patrician* is a vessel "touching" at a port of the United States "on its voyage" to a foreign one, and therefore within the exception contained in section 3 of the act; and (2) that the crew of a vessel arriving at a port of the United States from a foreign port or place, in the ordinary course of commerce and navigation, are not "laborers" within the meaning of the act.

When the *Patrician* entered the Columbia river the *terminus ad quem* or place of termination of her voyage was not definitely known. It might be either in Europe or the United States; and so far as now known it is in the former. But, even so long as it might be in either country, I think she ought to be, for the purpose of this act, considered as on a voyage to a foreign port. But it is certain that her port of final destination was not Astoria, at which place she merely called for orders. Nor had the voyage then terminated as to the steward and cook, whose engagements were for 24 months each from the date of signing the articles, unless sooner discharged. Section 4511, Rev. St. A "voyage" is not limited to the passage of a vessel from one port to another, but it may include several ports. Bouv. Law Dict. "Voyage;" 1 Parsons, Shipp. & Adm. 307. The word "touch" and its derivatives is, in a sense, a nautical phrase. It is defined thus: "To come or attain to; to arrive at; to reach; as, 'To touch their natal shore.'—Pope." And its use is illustrated as follows: "To touch at, to arrive at, or come to without stay, as in sailing. 'The next day we touched at Sidon.'—Acts, xxxvii, 3." Worcester. Dict. "Touch."

The word "touching" is evidently used in the act to signify the opposite of "staying." And it does not apply to the case of a compulsory entrance on account of distress or stress of weather, for that is specifically provided for. A vessel does not ordinarily touch at her home port, but remains there until a new voyage is undertaken. But in course of a trading voyage from England to Asia and back to Europe

or the United States, she may touch at many ports, and for many purposes. Calling at a port for orders is, in my judgment, a plain case of "touching" at such port; and if, in pursuance of the order obtained or being there, the vessel remains long enough to take in a cargo for a foreign port, I see no reason, under the circumstances, for concluding that she is thenceforth "staying," but not "touching," at such port. Upon this view of the case the *Patrician* has simply touched at this port. Her stay here is only temporary, and for an object necessary to enable her to prosecute a voyage to a foreign port with profit to her owners. Nor do I think that the Chinese members of the crew of the *Patrician* are "laborers" within the meaning of this act. True, their vocation is labor. But they are not brought here to remain and enter into competition with the labor of the inhabitants of the country. They labor upon the high seas in the navigation of a vessel engaged in the exchange of commodities between this country and other parts of the world.

This commerce it is the direct interest of both the labor and the capital of the country to foster and promote. In a note to the opinion of Mr. Justice FIELD, *In the Matter of Low Yam Chow*, 10 Pac. C. Law J. 135, [S. C. 13 FED. REP. 611,] it is stated, upon the authority of the Chinese consul, that the value of the commodities exchanged between China and the United States in the year of the Burlingame treaty (1868) was \$15,365,013; while for the year ending June 30, 1881, they had reached \$27,765,409; being a gain of almost 100 per centum in 13 years. When this treaty was concluded the export of flour at the port of San Francisco was about 20,000 barrels a year, while in 1881 it had reached 271,118 barrels—90 per centum of which was shipped by Chinese merchants.

It is not to be supposed for a moment that congress intended by the passage of this act to impede or cripple this commerce by prohibiting, in effect, all vessels engaged in the carrying trade to and from the United States, and particularly those on the Pacific coast, from employing Chinese cooks, stewards, or crews, when, for any reason, it is necessary or convenient to do so; for such would necessarily be the result of holding that the Chinese crew of a vessel coming from a foreign port to one of the United States are "laborers," within the meaning of the act. Such a "limitation" upon the right of the Chinese to enter or be brought within our ports is clearly beyond the letter and spirit of the concession made by the supplemental treaty, which declares that it shall only apply "to Chinese who may go to the United States as *laborers*;" that is, with the intention to labor

here and enter into competition with the labor of the country. Upon this ground, also, it is clear to my mind that the act does not apply to the crew of the *Patrician*. Of course, a Chinese seaman, although allowed to come into the ports of the United States as one of the crew of a vessel from a foreign port, does not thereby obtain the right to remain in the country and become a laborer therein; and if the master allows him to go ashore permanently, the latter would be liable to removal, and the former to the punishment prescribed in section 2 of the act. But such seaman would have the same right to be on shore temporarily and not otherwise employed than in the business of the vessel during her stay in port, as those of other nationalities.

Counsel for Moncan also claims that the act does not apply to him at all, and that he is entitled now to remain in the United States, as a laborer, because he was lawfully on board of an American vessel as a member of the crew thereof after November 17, 1880, and before the passage of the act, where he has ever since remained. The rule is well established that the vessels of a nation are to be considered as a part of its territory, and the persons on board of them are deemed to be within the jurisdiction and are protected and governed by the laws of the country to which such vessel belongs. Vattel, book 1, c. 19, § 216; Wheat. Internat. Law, 157; 1 Kent, 28; *Crapo v. Kelly*, 16 Wall. 611.

*In the Matter of Ah Sing*, 10 Pac. C. Law J. 52, [S. C. 13 Fed. Rep. 286.] Mr. Justice FIELD says:

"An American vessel is deemed to be a part of the territory of the state within which its home port is situated, and as such a part of the territory of the United States. The rights of its crew are measured by the laws of the state or nation, and their contracts are enforced by its tribunals."

For many purposes, in contemplation of law, Moncan has been within the territory and jurisdiction of the United States ever since he sailed from England on the *Patrician*, and I think this ought to be considered one of them. He joined the crew of an American vessel, bound for a port in the United States, before the passage of the act, and while in that condition is brought within the actual territorial limits of the country. To drive him back now from our shores as as a person prohibited by this act from residing within the United States, would, it seems to me, be giving it a narrow and harsh construction, utterly at variance with the spirit and intent of our treaty stipulations.

This act may be enforced so as, for all practical purposes, to exclude Chinese laborers from coming here and entering into competition with the labor of the inhabitants of the country, without spitefully straining it to cover a few doubtful or extreme cases, and thereby eventually bringing it into deserved odium and disrepute. Nor should it be forgotten by those who favor the exclusion of Chinese laborers from the country, and wish to see the experiment fairly tried, that the act is unfavorably regarded by a large portion of the most intelligent and influential people of the country "as being the servile echo of the clamors of the sand lot—as fraught with danger to our commercial relations with China, as inconsistent with our national policy, as obstructing the spread of Christianity, and as violative, not only of the treaty, but of the inherent rights of man." *HOFFMAN, D. J., In re Low Yam Chow*, 10 Pac. C. Law J. 140; [S. C. 13 FED. REP. 616.]

My conclusion is that neither Moncan nor Ah Kee are unlawfully in the country, within the perview of the act of May 6, 1882, because (1) they are simply on board of a vessel "touching" at this port while on a voyage to a foreign one; (2) they are here only as members of the crew of a vessel arriving from a foreign port and taking on cargo for another; and, further, that Moncan, having joined an American ship prior to the passage of the act, and remained on her until his arrival here, is not thereby prohibited from residing in the country.

The prisoners are discharged from the arrest, and the marshal is directed to return them to the vessel from which they were taken.

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### WILCOX v. FIVE HUNDRED TONS OF COAL.

(Circuit Court, N. D. Illinois. November 26, 1880.)

#### 1. ADMIRALTY—LIEN FOR FREIGHT—DELIVERY.

As a rule, where the cargo has been delivered to the consignee, the ship-owner does not retain a lien thereon for his freight unless there is an understanding between the parties, when the goods are delivered to the consignee, to that effect, or it is the usage of the port where the cargo is delivered that the lien shall remain.

#### 2. SAME—NEGLIGENCE OF CAPTAIN—WINTERING.

The evidence in this case showing that the captain was not guilty of negligence in not completing the voyage on account of rough weather, it was held that the district court erred in awarding damages on that account.

In Admiralty.

*W. H. Condon*, for libellant.

*Robert Rae*, for respondent.

DRUMMOND, C. J. The schooner *American* was at Oswego in the fall of 1872, and took in a cargo of coal for Chicago, leaving Oswego on the tenth of November. A general bill of lading was given, and a high price charged for the transportation of the coal from Oswego to Chicago, being \$2.75 per ton. The schooner met with adverse winds and did not arrive at Port Huron until November 29th. The weather, according to the testimony of the witnesses, was very inclement that fall, and the captain concluded that the safest course was to strip the vessel and lay up at Port Huron. The schooner accordingly remained there with her cargo during the winter, and the coal was not delivered in Chicago or received by the consignees until May 8, 1873, when the spring freight was paid by the consignees on the coal, being much less than that charged in the bill of lading. After the coal had been thus delivered by the schooner to the consignees, a libel was filed claiming the amount of freight stated in the bill of lading, the consignees having refused to pay any more than the spring price of freight. The case went to proof before the district court, where the libel was dismissed; but a cross-libel having been filed claiming that the captain of the *American* was negligent in wintering at Port Huron, and that the vessel should have come on in the fall of 1872, the district court gave a decree on the cross-libel for damages against the libellants in consequence of the supposed negligence of the captain. From these decrees the libellants have appealed to this court, and the question is whether the decrees of the district court are right.

The first question is on the decree of the district court dismissing the libel. That decree, I think, was right. The rule laid down by the supreme court of the United States in *Bags of Linseed*, 1 Black, 108, is that in order that the ship-owner should retain a lien on the cargo for the freight, it should not be delivered to the consignee. The rule is absolute, and there may be circumstances where a cargo may be delivered to the consignee and the lien of the ship-owner retained. But the supreme court declares that in all such cases, when the goods are delivered to the consignee, there must be an understanding between the parties that the lien of the ship-owner remains upon the cargo; or it must appear there is an established local usage of the port where the cargo is delivered, that the lien shall remain. I do not think this case is brought within any of the rules laid down

by the supreme court. The language of the libel is "that by reason of the premises the libelants acquired a lien on said cargo for the freight thereon, as set forth above," which amounted in the whole to the sum of \$1,375. This was the amount due for freight, on the assumption that \$2.75 per ton was to be paid, claiming the whole amount as contained in the bill of lading.

The answer of the claimants to this allegation of the libelant is that, in regard to the matter stated in the fifth article of the libel on information and belief, they deem the same to be true; and it is claimed on the part of libelant that there is an admission in the answer that the libelant had a lien. But I think this is not a true construction of the language of the answer. It is entirely inconsistent with other claims set forth in the answer, and it could not have been the meaning of the defendants in the court below, and they could not have intended to admit that the libelant had a lien on the cargo for the whole amount of the stipulated freight. I take it, therefore, all they intended to admit was that if the freight had been brought to Chicago in the fall of 1872, then the vessel would have had a lien for the freight stipulated in the bill of lading. This question of pleading being decided adversely to the libelant, is there any other proof which will bring the case within the rule as stated by the supreme court of the United States? I think there is not. Certainly, there was no understanding on the part of the consignees that the lien was retained by the libelant; there is no proof whatever of any statement made or claim insisted on at the time the property was delivered to the consignees. There is no settled usage of the port of Chicago shown upon the subject of these liens where the property is delivered to the consignee. So on that account I think the lien must fail. But, independent of that, it may be a question whether the fair construction of the contract between the parties was not that the price was to be paid on the assumption that the property was delivered in Chicago that fall. There is no evidence whatever upon this point, and the court is left to infer what the intention of the parties was at the time the coal was delivered on the vessel in the early part of November, 1872. The price was a very high price,—confessed y so; and perhaps the natural inference to be drawn from all the circumstances of the case is that the price was agreed to be paid on the understanding that the coal was to be delivered in Chicago that fall; and if that is so, the libelant is not entitled to the full amount of the price named in the bill of lading, because that would be an essential element entering into the contract. It was so early in the fall that the expectation by



both parties probably was that the vessel would arrive in Chicago before navigation closed. Therefore, I hold that the decree of the district court in dismissing the libel was correct. But I also hold that the decree of the court in sustaining the cross-bill and awarding damages to the consignees, on the ground that the captain had been guilty of negligence in remaining at Port Huron, was incorrect, and must be reversed.

I have gone through all the testimony in this case, and I think the evidence is conclusive that the captain was guilty of no negligence in wintering his vessel at Port Huron. He did not arrive until November 29th, and there is no satisfactory evidence that any sailing vessel passed Port Huron after the arrival of the schooner American there. There is evidence, to which some weight must have been attached by the district court, that some sailing vessels passed after that time; and there was some testimony taken from the deputy collector of customs here about the arrival of vessels in Chicago; but there is no satisfactory evidence whatever, and I have examined the case with the utmost care to that view, upon which the court ought to rely, showing that any sailing vessel passed Port Huron after the arrival of the American there. But suppose it were so, and that vessels did pass Port Huron after the arrival of the American, and did arrive in Chicago that fall, that is not the rule by which this case is to be governed. It is not because of that the master of this schooner should be charged with negligence. The question is whether he was, in point of fact, guilty of negligence in wintering his schooner there. All the testimony concurs in this: that the fall was remarkably boisterous and rough, with a great deal of tempestuous weather. There is concurrent testimony on the part of masters of vessels that it would not have been prudent for the American to leave Port Huron after her arrival there, with a view of proceeding to Chicago, and the question is to be determined by the state of the case at the time; and if, acting as a reasonably-prudent man, in exercising that prudence he made a mistake, he is not to be visited with damages as if he had been guilty of negligence in not coming forward with his vessel to Chicago. The court is to look at the surrounding circumstances attending the arrival of the American at Port Huron, as developed by the testimony, to see whether it was a prudent act for the master to remain, or whether his duty to the consignees required him to take the risk which obviously existed, and push his vessel forward in the hope of arriving at Chicago during the fall. I think the testimony is satisfactory that it would have been an act of imprudence for him to attempt to reach Chicago, and there-

fore any decree which visits him with the consequences, as if he had been guilty of negligence, should not be sustained.

The result, therefore, will be that the decree of the district court dismissing the libel will be affirmed, and the decree of the district court sustaining the cross-bill will be reversed; and the costs must be apportioned.

After the foregoing opinion was given, by agreement the case was submitted to HARLAN, Justice, who, without giving any opinion, concurred in the decree of the circuit judge.

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*In re* LEONARD and others.

(District Court, S. D. New York. August 12, 1882.)

1. COLLISION—LIMITED LIABILITY—JURISDICTION.

Proceedings to limit the liability of ship-owners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district.

2. SAME—RULES OF MARITIME LAW.

Under the decision of the supreme court (October term, 1881,) in *Nat. Steam Nav. Co. v. Dyer*, that the statute limiting the liability of ship-owners is to be administered in our courts as a general rule of maritime law, proceedings to limit liability may be instituted by the owners of an American vessel against foreign as well as against domestic ships, or their owners, in respect to claims arising from collisions upon the high seas.

3. SAME—EQUITABLE CLAIM TO PROCEEDS.

Where the American schooner J. M. L. and her cargo were totally lost in a collision at sea with the British steamer A., and on a libel *in personam* in this court an interlocutory decree had adjudged the owners of each vessel to pay half the damages, and pending a reference thereon the owners of the schooner filed a petition to limit their liability in respect to half the cargo lost; held, that this court had jurisdiction of the proceeding, and was the most appropriate court to determine whether the fund to be derived from the steam-ship for the loss of the schooner, being her only remaining proceeds, should be paid over to the trustee, or retained by the owners of the schooner, or secured to the owners of the lost cargo, by provisions in the final decree in the former suit to the extent of their claim, or to the extent necessary to save the steamer from liability for lost cargo beyond the terms of the interlocutory decree.

4. SAME—INNOCENT PART OWNERS.

Though the master, a part owner, be privy to the negligence which caused the loss, the other innocent part owners may have the benefit of the statute.

In Admiralty.

Scudder & Carter and Geo. A. Black, for petitioners.

Foster & Thompson and R. D. Benedict, opposed.

BROWN, D. J. The petitioners are the owners of the schooner Job M. Leonard, an American vessel which was sunk in April, 1877, by a collision with the British steam-ship Aragon, about 15 miles south of Long Island. Nothing was saved of the schooner, or of her cargo. Upon a libel *in personam* thereafter filed in this court by the petitioners against the owners of the steam-ship, an interlocutory decree was entered in December, 1879, adjudging both vessels in fault, and that each pay half the damages. *Leonard v. Whitwell*, 10 Ben. 638, 658.

In February, 1880, the present petition was filed alleging that the collision occurred without the privity or knowledge of the petitioners, and claiming the benefit of the limited liability act, (Rev. St. §§ 4283, 4285,) specially in reference to their personal liability for the value of the remaining one-half part of the cargo to the owners thereof. The owners of the steam-ship have filed exceptions to the petition, alleging that all the petitioners are residents of Massachusetts, and not of this district, and that the owners of the steam-ship Aragon are British subjects and neither residents, nor served with notice of these proceedings, within this country; and they, therefore, deny that this court has jurisdiction of the proceedings, or that the statutes in question can be invoked or applied as against a British vessel in respect to a collision on the high seas.

The point raised by the exception last named is so plainly covered by the emphatic language of the supreme court in the case of *The National Steam Navigation Co. v. Dyer*, decided at the last term, that I cannot consider it an open question in this court; although the present case differs from that in the circumstance that here the foreign vessel is resisting the application of our statutes to the collision on the high seas, while in the case of the *Kate Dyer*, the foreign vessel was invoking the benefit of the statutes as respects a similar collision. But not only was the decision of the supreme court in that case put upon the ground that the statutes in question were to be treated by our courts as forming a part of the general maritime law and "the rule by which, through the act of congress, we have announced that we propose to administer justice in maritime cases;" but the supreme court further expressly say: "Of course the rule must be applied, if at all, *as well when it operates against foreign ships, as when it operates in their favor.*" In the case at bar the statutes, as it is supposed, may operate *against* the foreign ship by increasing her liability to the owners of the lost cargo by relieving the petitioners from the half they have been adjudged to pay; and this

petition is opposed on that ground. Whether that result shall follow or not, (which need not be here determined,) it is clear, I think, that the supreme court have declared the maritime rule of our courts to be in accordance with this statute, as well when adverse to, as when for the benefit of, foreign ships or foreign owners, and any limitation upon the rule thus broadly announced must be sought in that court and not here.

The other exception to the jurisdiction on the ground that none of the petitioners reside in this district, and that neither the schooner, nor any part of it, or of the cargo, are within this jurisdiction, should also be overruled; not only because the statute expressly authorizes the proceedings to be instituted "in any district," (*The Alpena*, 8 FED. REP. 280,) but because there are special reasons why this district is the appropriate one in this case.

The persons chiefly, if not solely, interested in opposition to the petition are the owners of the lost cargo, and the owners of the *Aragon*. The latter, by the interlocutory decree of this court, have already been adjudged to pay one-half of the entire damages arising from the collision, and a reference to ascertain the amount is still pending. One avowed purpose of the petitioners in these proceedings is to be exempted from liability to pay for their half part of the cargo lost, which, by the interlocutory decree, they have been adjudged to pay, while retaining to their own use the one-half part of the value of the schooner, which they expect to recover from the owners of the *Aragon* through the final judgment of this court. If this can be legally done through the proceedings now instituted, then the owners of the *Aragon*, after paying for one-half of the cargo under that decree, will still remain liable to the owners for the other half of the cargo, (*The Atlas*, 93 U. S. 302;) and the intention of the interlocutory decree of this court, that the owners of each vessel sustain and pay one-half of the damages, (10 Ben. 658,) will be evaded, to the manifest injury and loss of the owners of the *Aragon*. The latter have, therefore, a plain equity that the final decree in that suit shall be framed in reference to any proceedings that may be had to limit the liability of the owners of the schooner, so that the intent of that decision shall not be thwarted. The money to be paid by the owners of the *Aragon* for the loss of the schooner, *i. e.*, one-half of its value, equitably represents so much of the schooner. That fund is, or will be, in this court, where the security for it is now on file; there is no other fund, or proceeds, representing the schooner in any other district; and the question, what shall be done with that fund, whether

paid over to the trustee to be appointed in the limited-liability proceedings, or, on the contrary, allowed to be retained to their own use by the petitioners as claimed, or secured to the owners of the cargo through provisions in the final judgment in the suit *in personam*, so far as necessary to indemnify them and save the owners of the Aragon from a liability to pay for the other half of the cargo, contrary to the judgment already rendered, are questions which ought to be, and can be, most conveniently and appropriately determined in this court, where the fund substantially is, and where the litigation instituted by the petitioners to obtain it is now pending. *Norwich Co. v. Wright*, 13 Wall. 104, 124, 126. The owners of the cargo lost, as well as the owners of the Aragon, are directly interested in the determination of that question.

The question of the effect of the appointment of a trustee under these proceedings, and of the application of the statute, or of these proceedings, to foreign ships, *in invitum*, does not necessarily arise upon these exceptions. It is enough that there appear to be claims, like that for the loss of the cargo in this case, to which the proceedings may undoubtedly apply. The exceptions above stated are therefore overruled.

No point was made on the argument as regards the alleged privity or personal fault of Crowley, the master and a part owner, in the negligence which caused the collision. If that is insisted on, it must be determined like any other disputed question of fact. If determined against him, that would not prevent the proceedings going on for the benefit of the other innocent owners. *The Obey*, L. R. 1 Adm. 102; *The Spirit of the Ocean*, Brow. & L. 336; *Wilson v. Dickson*, 2 Barn. & Ald. 2.

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### WALLACE v. PROVIDENCE & STONINGTON STEAM-SHIP CO.

(Circuit Court, D. Massachusetts. October 21, 1882.)

#### 1. ADMIRALTY—REV. ST. § 4283, (ACT OF CONG. MARCH 3, 1851.)

Plaintiff claimed damages for personal injuries and loss of baggage by reason of a collision in Long Island sound between two of defendant's steamers, and defendant answered that under the act of March 3, 1851, it had surrendered its vessel in the southern district of New York, and that plaintiff had filed no claim. *Held*, on demurrer by plaintiff, that the act of congress of March 3, 1851, does not except from its operation owners of vessels whose routes are partly by land and partly by water, nor those whose vessels are not registered, nor, in the meaning of section 7 of said act, is the navigation of Long Island sound

*inland* navigation; and that the surrender of its vessel in the district in which it had been sued was according to law, and plaintiff was precluded from making any claim for loss of baggage, but as to his *personal* injury he *might* be allowed to prove his case.

2. SAME—PERSONAL INJURIES.

Whether the exemption under section 3 of the act of March 3, 1851, extends to *personal injuries* is not decided.

*J. P. Treadwell* and *Geo. E. Filkins*, for complainant.

*Russell & Putnam*, for defendants.

Before LOWELL and NELSON, JJ.

NELSON, D. J. The plaintiff sues in tort for personal injuries, alleging in substance that the defendants are the owners of a line of steam-vessels engaged in the transportation of passengers and merchandise between the city of New York and Stonington, in the state of Connecticut, over the waters of Long Island sound; that on the eleventh of June, 1880, the defendants, for hire, received the plaintiff, with his baggage, on board the *Narragansett*, one of the defendants' line of steamers, at New York, as a passenger, and undertook to transport him, with his baggage, to Stonington, and thence by railroad to Boston; that while the plaintiff was being so transported in Long Island sound the *Narragansett* came in collision with the *Stonington*, another steam-vessel owned by the defendants, and belonging to the same line, by which collision he was cast into the water and suffered great personal injury, and his baggage, of the value of \$500.90, was wholly lost; that the collision occurred within three miles of the Connecticut shore, and was caused by the negligence and omissions of the defendants, and their servants and agents, in the management of both vessels; and that he was in the exercise of due care.

The answer of the defendants, besides a general denial of the plaintiff's allegations, sets up in defense certain proceedings in the district court of the United States for the southern district of New York, under the limited-liability act of March 3, 1851, (Rev. St. § 4283 *et seq.*) whereby the defendants claim that they were discharged from all further liability for damage to person and property arising out of the disaster to the *Narragansett*. By these proceedings, which are set forth *in extenso* in the answer, it appears that soon after the collision certain parties brought suits in the state courts of New York against the company for damages arising out of the disaster; that after these suits had been brought in New York, and before the date of plaintiff's writ, defendants filed their libel and petition in the district court of the United States for the southern district of New York, setting forth the facts of the said disaster, alleging that the collision happened, and the

damage and loss were occasioned, without their privity or knowledge; that the accident occurred solely from the dangerous and difficult navigation of the channel, and the dense fog; that the entire value of vessel and freight was not sufficient to make compensation to all the freighters and owners for their losses, and praying for the relief granted by the act of March 3, 1851; that the petitioners offered to transfer their interest in the steamer and freight, for the benefit of all persons claiming to have suffered any loss, destruction, damage, or injury done, occasioned, or incurred on said voyage, to a trustee, for the persons who might prove to be legally entitled thereto, and prayed said district court to appoint a trustee, and to issue a monition against all persons claiming damages for the loss, destruction, damages, and injury occasioned by said disaster on board said steam-ship Narragansett, citing them to appear and prove their claims; that such monition was issued, and a transfer was made to a trustee appointed by the court on the fifth day of October, 1880, the return-day of said monition, proclamation was made for all persons claiming damages for any loss, destruction, damage, or injury occasioned by the disaster to appear and present their claim; that plaintiff did not appear nor present any claims; and that a decree was afterwards made whereby all persons who had not presented claims were forever debarred from prosecuting them, and apportioning the proceeds of the vessel and freight among those who had presented their claims in pursuance of the order of the court, and ordering any balance that might remain after satisfying such claims to be paid to defendants.

To this portion of the defendants' answer the plaintiff has demurred, and has assigned the following causes of demurrer:

(1) Because the act of March 3, 1851, does not exempt from liability common carriers who are owners of vessels used in inland navigation. (2) Because the act does not exempt owners of vessels where the damage to passengers is involved. (3) Because the act does not exempt common carriers who are such both by land and water. (4) Because the act does not exempt owners of vessels not registered. (5) Because the act does not exempt owners who have not surrendered the whole subject of the disaster, namely, as in this case, both of their ships which were engaged in the collision. (6) Because the act does not exempt owners who do not surrender their vessels in the district of the United States in which the disaster occurred. (7) Because the act does not exempt owners of vessels when the surrender is not made in the jurisdiction where the corporate owner resides, or is created.

None of these grounds of demurrer can be sustained. Long Island sound is a part of the Atlantic ocean, and its navigation is in no sense inland navigation within the meaning of that term as used

in section 7 of the act, (section 4289.) Nor does the act except from its operation owners of vessels whose routes are partly by land and partly by water; nor those whose vessels are not registered. The surrender of the Narragansett and her freight was made in the district where the owners were sued for the injury caused by the collision, as required by the fifty-seventh admiralty rule. It is unnecessary, at this stage of the case, to decide whether the exemption of section 3 extends to personal injuries to passengers caused by collision. The answer must stand if the decree in the proceedings in the southern district of New York can, in any view of the case, be a defense to the action.

The plaintiff alleges that the defendants were engaged in the transportation of passengers and merchandise, and by the collision, through the fault of both vessels, his baggage, of the value of \$500.90, was wholly lost. He therefore alleges a loss of property shipped on board the vessel and lost by the collision. The decree must, at least, have the effect to preclude him from recovering for the loss of his baggage through any fault on the part of the Narragansett. Whether it should have any further effect it is not necessary to decide now, and can better be passed upon at the trial, if the plaintiff then makes out a sufficient case to submit to the jury.

Demurrer overruled.

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### THE MARGARETHE BLANCA.\*

(Circuit Court, E. D. Pennsylvania. October 23, 1882.)

#### ADMIRALTY—GENERAL AVERAGE—SPARS BLOWN OVERBOARD AND CUT ADRIFT.

A portion of a vessel's spars and sails were blown overboard by a gale and lay along-side the vessel, pounding against her side, but secured to her by the rigging. The gale continuing, the spars were cut adrift in order to prevent them from pounding a hole in the vessel's side. *Held*, (affirming the decree of the district court,) that the cargo must contribute to the loss sustained by their sacrifice.

Appeal from a Decree of the District Court. The facts and the opinion of the district court are fully reported in 12 FED. REP. 728.

*Joseph Parrish, Edward Hopper, and Treadwell Cleveland*, for appellant.

*Charles Gibbons, Jr.*, for appellee.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.



McKENNAN, C. J. The law of jettison and general average is so accurately and concisely stated, in the opinion of the learned judge of the district court, that it need not be restated here, and its decisive applicability to the present case in support of the libel requires no additional argument to demonstrate.

On a voyage of the *Margarethe Blanca* from Pillau to Philadelphia a violent storm occurred, by which the vessel's jib-boom and foremast head were snapped, and her maintop-gallant mast was carried away. All the spars, with their sails and yards, fell over the side of the vessel, to leeward, in the water, and were there held together by their rigging, and to the vessel by the running and standing rigging. The spars pounded heavily against the ship in the sea-way, and the jib-boom chafed and plunged into and against her bows. The vessel and her cargo were thus in imminent danger of shipwreck; and to avert it, and save the ship and cargo, the master cut away the disabled spars, sails, and rigging, and they were cast adrift and lost.

There was, then, the co-existence of the essential elements of a good claim to general average—imminent peril, involving alike the vessel, cargo, and crew; and a voluntary jettison of part of the spars, sails, and rigging, to avoid this peril. But it is earnestly urged that the jettisoned material was “wreck,” and hence was not voluntarily sacrificed, and is not a legitimate subject of compensation by general average. In the sense of displacement, and hence of present unadaptedness to a serviceable use, it is properly so described. But it was not useless because it was irrecoverably lost. It remained attached to the vessel by rigging, which was new, strong, and unbroken. If the storm had abated it could certainly have been preserved. If the storm continued and the vessel survived, the weight of the proof is that the jettisoned spars, sails, and rigging would probably have been saved also. But the storm had rendered it, for the time being, useless, and it was a cause of additional and increasing peril to the vessel and cargo. With a probability of its eventual salvage in common with the ship, to avoid the danger impending over both it was cut away and sent adrift. Under these circumstances the property was not valueless; and although its subsequent loss may have been inevitable, this did not divest the casting away of it of its voluntary character.

As was said by Mr. Justice Grier in *Barnard v. Adams* 10 How. 305:

"And when it is said of the *jactus* that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril in place of the whole, and for the benefit of the whole. It is made (if we may use another theological phrase) the 'scapegoat' for the remainder of the joint property exposed to common destruction. The *jactus* is said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved by transferring the whole peril to another part. \* \* \* The loss or damage arising from its assuming the peril that the ship may escape, may truly be said to be the real 'sacrifice,' in the popular use of the phrase. Its value is not measured by its hopes of safety, for, by the hypothesis, it had none; but its right to contribution is founded on its voluntary assumption to run all the risk, or bear the brunt, that the remainder may be saved from the common peril."

Participating, then, with the ship and cargo in a peril which seemed to render the loss of all inevitable, the disabled rigging was cast away to save the remainder, and was thus "sacrificed" in the proper sense of a lawful jettison, and its loss must be compensated by general average. The decree of the district court is therefore affirmed, and a decree will be entered for the sum claimed in the libel, with interest and costs.

See *The Margarethe Blanca*, 12 FED. REP. 728.

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### THE ROMAN.\*

(Circuit Court, E. D. Pennsylvania. October 27, 1882.)

#### 1. ADMIRALTY—COLLISION—FAILURE TO SHOW TORCH—CONCURRENT NEGLIGENCE—BURDEN OF PROOF.

Where a sailing vessel fails to show the prescribed torch upon the approach of a steamer, and a collision occurs which presumably would have been avoided had the torch been shown, the burden of proving concurrent negligence on the part of the steamer is on the sailing vessel, and such concurrent negligence will not be held upon uncertain proof or doubtful conclusions.

#### 2. SAME.

Where the evidence is conflicting as to the exhibit of a light, and if the witnesses for the sailing vessel were believed the course of the steamer could only be accounted for on the hypothesis of criminal negligence, such a conclusion will not be adopted.

#### 3. SAME—EVIDENCE OF STATEMENTS OF CREW.

No weight is to be attached to evidence that a statement was made by one of the steamer's crew that he saw the light in time to have avoided the collision. *The Roman*, 12 FED. REP. 219, reversed.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Appeal from a decree of the district court. The facts and the opinion of the district court are fully reported in 12 FED. REP. 219.

*Henry G. Ward* and *Morton P. Henry* for appellants.

*John A. Toomey* and *Henry R. Edmunds* for appellee.

McKENNAN, C. J. In the district court the schooner was adjudged to be in fault in omitting to exhibit the light required by the rules of navigation, and that adjudication is but faintly, if at all, contested here. Half damages were decreed against the steamer, on the ground that a globe light was swung from the stern of the schooner towards the steamer, which the latter ought to have seen, and thus have avoided the collision.

The side regulation lights on the schooner were confessedly invisible to the steamer, and the only warning she could have of the proximity of the schooner was the swinging of the globe light. That such a light was exhibited we regard as sufficiently proved, but whether in time to enable the steamer to adapt her movements to the emergency, is matter of very serious doubt. The schooner's witnesses, who were on her deck, testify that it was seasonably exhibited; while the captain, mate, wheelsman, and lookout on the steamer, who were on deck and affirm that they were observant, deny that they saw any light. It was the especial duty of the lookout to exercise constant vigilance, and it is not an unreasonable presumption that he was not unfaithful to his obligation. If the steamer was approaching the schooner dead astern, and the globe light was not shown until just before the steamer's helm was put a-port, the strong probability is that none of the persons on her deck could see the light over her bow. If it was exhibited eight or ten minutes before the collision, and as the schooner's witnesses testify, so that it must be inferred that the steamer saw it, her conduct can only be accounted for on the hypothesis of criminal recklessness or negligence, because a slight and perfectly practicable deflection from her course would have carried her safely astern of the schooner. This conclusion ought not to be adopted except under the pressure of preponderating proof; and especially as the motive of pecuniary interest, and of the safety of the vessel and of those on board of her, bears strongly against it.

In this connection we have not attached any weight to the testimony touching a declaration or statement by some one of the steamer's crew that he saw the globe light in time to avoid the collision, because we regard it as, at least, of questionable competency, (*The Seaton*, 2 W. Rob. 391; *The Empire State*, 1 Ben. 64; *Railroad Co. v. Brooks*, 57 Pa. St. 339; *Packet Co. v. Clough*, 20 Wall 528,) and

as inherently indefinite and unsatisfactory. But taking into consideration all the evidence, and giving to that on each side the weight to which it is fairly entitled, we are unable to conclude that the men on the steamer either saw the globe light, or that it was exhibited at such a time, in such a way, or under such circumstances, as that they ought to be presumed to have seen it. If the schooner had performed its duty by exhibiting the prescribed light, presumably it would have escaped injury. The burden is upon it to show that the cause was the misconduct or negligence of somebody else; and it must be borne upon no uncertain proof or doubtful conclusions. We cannot relieve it of the full consequences of its own dereliction by transferring them partly to another, whose culpability is problematical.

The libel must be dismissed with costs, and it is so decreed.

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### THE NEDERLAND.\*

(Circuit Court, E. D. Pennsylvania. October 23, 1882.)

#### ADMIRALTY—COMMON CARRIER—NEGLIGENCE—INJURY TO PASSENGER.

In an action against a steam-ship to recover damages for injuries sustained by a passenger, unless it appears that the respondent failed in the exercise of that degree of care and diligence which the law requires of carriers of passengers, and that its negligence in this behalf was the cause of the libellant's injury, the latter cannot recover.

Appeal from a Decree of the District Court.

The facts and the opinion of the district court are fully reported in 7 FED. REP. 926.

*D. Cowan, M. Veale, and J. Warren Coulston, for appellant.*

*Henry G. Ward and Morton P. Henry, for appellee.*

MCKENNAN, C. J. This is an appeal from the decree of the district court dismissing a libel *in rem* for the recovery of damages for personal injuries received by the libellant on board the Belgian steamer *Nederland*, as the consequence of the alleged negligence of the officers and employes of said vessel.

The following facts are found as the result of the evidence:

(1) On the twenty-first of February, 1877, the libellant was a steerage passenger on the *Nederland*, on a voyage from Antwerp to Philadelphia.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

(2) On that day the crew was ordered to handle the fore try-sail boom, preparatory to setting the fore try-sail. The libelant and a number of other passengers were sitting under the boom, and were directed by an officer to move away, which warning was expressed in three languages—English, German, and Belgian.

(3) All the passengers moved away except the libelant and another.

(4) While the crew were pulling up the boom by means of the port lift, the block which connected the tackle, by a swivel hook, with the eye-bolt in the deck gave way, and the boom coming down struck the libelant in the back, and inflicted permanent injuries upon him.

(5) The block was constructed of the material and after the manner of those in general use in foreign vessels, and was altogether suitable for the purpose for which it was used.

(6) A strong iron band was tightly bound around the block, and through it passed a swivel-hook, secured by a shoulder, which rested on the under side of the band, and between it and the top of the wooden block.

(7) The swivel-hook drew out of the iron band in which it was fastened, allowing the boom to fall and strike the libelant. This was owing to a latent defect in the shoulder, which could not be discovered by an exterior examination of the block, or without taking it all apart.

(8) On every trip of the vessel the blocks were all overhauled, the bolts and sheaves taken out and put in order, and the swivels seen to be in working condition.

(9) The place where the injury occurred to the libelant was not one of special danger. The only danger was such as might result to those in the way of the moving ropes and sails, and from the possible breaking of the machinery in the process of lifting the boom.

(10) Upon all the evidence in the case negligence contributory to the libelant's injury is not imputable to the respondent.

Unless it appears that the respondent failed in the exercise of that degree of care and diligence which the law requires of carriers of passengers, and that its negligence in this behalf was the cause of the libelant's injury, he cannot recover. As it is found that the respondent was not negligent in the performance of the full measure of his duty to the libelant, his libel must be dismissed, with costs; and it is so ordered.

## STATE OF TEXAS v. LEWIS and others.

*(Circuit Court, N. D. Texas. October Term, 1882.)*

## 1. REMOVAL OF CAUSES—STATE AGAINST ALIEN.

The grant of original jurisdiction by article 3, § 2, of the constitution, to the United States supreme court in all cases in which a state is a party, does not preclude congress from conferring jurisdiction upon the circuit courts in cases brought by a state against an alien; and by section 639 of the Revised Statutes, in terms and effect providing for the removal of such cases from the state courts congress has conferred such jurisdiction in removed cases.

## 2. REVISED STATUTE, § 639—ACT OF CONGRESS, MARCH 3, 1875.

Section 639 of Revised Statutes is not repealed by act of March 3, 1875, except by merger, and a case which could have been removed under the former provision, but could not be under the latter act, may still be removed.

On Motion to Remand.

*Clark & Dyer and Chas. A. Jennings, for plaintiff.*

*Hancock & West and Gen. Tom Harrison, for defendants.*

PARDEE, C. J. This cause was heard on the motion to remand at the last term by the district judge sitting in the circuit court, and the motion was denied. See 12 FED. REP. 1. The motion has been reargued at this term, at the suggestion of the district judge, that the circuit judge might also pass upon the case. In reaching the same conclusion as before but little need be said in addition to the reason formerly given by the district judge. It seems now to be undisputed that the suit is one "against an alien," and that the first clause of section 639, Rev. St., (twelfth section of judiciary act of 1789,) in terms and effect provides for the removal of the case to this court. And there is not much contention that the first clause of section 639 is not repealed by the subsequent legislation of March 3, 1875, except by merger. There is no express repeal in the act of 1875, § 10, of any specified previous acts, the repeal being only of "all acts and parts of acts in conflict with the provisions of this act."

"It would seem that subdivision 1 of section 639, Rev. St., is practically repealed by reason of being merged in the more enlarged right given by the act of 1875. If, however, a case should arise which could be removed under this provision, but which could not be removed under the act of 1875, the former would be held to be still subsisting." Dill. Rem. 28.

And this view taken by Judge DILLON seems to be the correct view of the question. The case under consideration is not claimed to be within the provisions of the act of 1875, but it is within the provisions of the first subdivision of section 639. The said section must

be then held as still subsisting for this case, if for no other. The case must be taken, then, as one which congress has provided may be removed from a state court to this court and be tried in this court, and the only question open for discussion and decision is whether congress had the constitutional authority to pass such provision. The suit being one by a state against an alien, there is and can be no question that the judicial power of the United States extends to it, under the first clause of section 2, art. 3, of the constitution of the United States. The second clause of said section reads:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to the law and fact, with such exceptions and under such regulations as the congress shall make."

And this brings us to the real question for determination here, *i. e.*, does the grant of original jurisdiction to the supreme court in all cases in which a state shall be a party, preclude the congress from conferring jurisdiction upon the circuit court in cases brought by a state against an alien? The eleventh amendment of course settles that in cases brought or prosecuted by an alien against one of the United States, the courts of the United States are without jurisdiction. If congress can confer jurisdiction upon the circuit court in cases brought by a state against an alien, then, as we understand section 639, Rev. St., congress has done so in cases brought by a state against an alien, in a state court, by authorizing the removal of such case to the circuit court, and directing that the case shall be proceeded with in the circuit court. Whether congress has authorized such cases to be originally instituted in the circuit court does not matter at this time. The full examination given this question by counsel and by ourselves shows no decision of this precise question by the supreme court, and only one decision by inferior courts of the United States, to-wit: *Gale v. Babcock*, 4 Wash. C. C. 199, 344. There may be other cases, but our industry has not found them.

The case of *Gale v. Babcock*, *supra*, was a case in all its material points identical with the one under consideration. The decision was adverse to the right of removal, and to the thus acquired jurisdiction of the circuit court; but Justice WASHINGTON, who decided the case, assumed as axiomatic the want of jurisdiction, and gives no reasons. The other cases cited by counsel as bearing on the question (*Prentiss v. Brennan*, 2 Blatchf. 164; *Georgia v. Brailsford*, 2 Dall. 402; *State v. Trustees*, 5 N. B. R. 466; *Wisconsin v. Duluth*, 2 Dill. 406; *Cohens*

*v. Virginia*, 6 Wheat. 264; *Osborn v. Bank*, 9 Wheat. 738; *The Wheeling Bridge Case*, 13 How. 520; 4 Dall. 12; 2 Pet. 136; 5 Cranch, 303; 2 Blatchf. 162; 3 Blatchf. 244) have all been considered in the opinion heretofore rendered in this case by Judge McCORMICK; and it is only necessary to further remark that the decision in no one of them is in conflict with the conclusions reached in the case. In all those cases, and in many others, the judges have argued the question of the jurisdiction of the circuit courts in cases where a state was the plaintiff, and have intimated opinions for and against the power of congress to confer such jurisdiction, but in no one of them was the question really in issue.

In our opinion the argument, so far as reason is concerned, and so far the *dicta* of eminent jurists go, is in favor of the power of congress, and we think that in cases like this under consideration congress has conferred the jurisdiction. There is no necessity to go over the cases and elaborate the reasoning of judges in favor of this proposition. Our examination makes it clear to us that the better judgment is on the side of the power of congress in the premises. This conclusion is strengthened by a line of authorities in cases arising under the same constitutional provisions in regard to consuls.

Cases affecting consuls stand in the same precise category as cases in which a state shall be a party; that is, the judicial power of the United States extends to them, and the supreme court is given original jurisdiction in them. The ninth section of the judiciary act of 1789 (Rev. St. § 563, subd. 17) expressly conferred jurisdiction on the district courts "of all suits against consuls or vice-consuls, except for offenses," etc. The objection was early made—as early as in 1793—that this was in violation of the constitution as trenching on the original jurisdiction conferred upon the supreme court. *U. S. v. Ravarra*, 2 Dall. 297. According to Chief Justice TANEY the question was variously decided and argued by eminent judges and jurists through a series of cases thereafter, and the question remained an open one until the case of *Davis v. Packard*, 7 Pet. 281, directly affirmed the constitutionality of the act of 1789. See *Gittings v. Crawford*, Taney, 1 *et seq.*, in which case the chief justice, after reviewing the prior decisions and opinions, and following, as he says, the case of *Davis v. Packard*, the opinions of elementary writers, and the contemporaneous construction of congress; decided in favor of the act of 1789.

Seventeen years afterwards Judge BETTS, with Justice NELSON concurring, held the same way. *St. Luke's Hospital v. Barclay*, 3



Blatchf. 259. Two years afterwards, in the case of *Graham v. Stucken*, 4 Blatchf. 50, Justice NELSON again goes over the arguments and authorities on the question as to the constitutionality of the act of 1789, in relation to consuls, and in a very lucid opinion maintains the act. The following passage from his opinion bears directly upon the case under consideration. He says:

"Again, the grant of original jurisdiction to the supreme court is the same in the cases (mentioned in the previous clause of the constitution) in which a state shall be a party, as in the case of a consul. Those cases are controversies (1) between two or more states; (2) between a state and citizens of another state; (3) between a state and foreign states; (4) between a state and citizens of a foreign state—that is, aliens. Now, if the grant of original jurisdiction be exclusive, in the supreme court, in the case of a consul, it is equally exclusive in the four cases above enumerated; *for the grant is in the same clause and on the same terms.* And yet in the thirteenth section of the judiciary act, already referred to, it is provided that the supreme court shall have exclusive jurisdiction, etc., where a state is a party, etc., except between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction. According to the argument, the whole of this exception would be unconstitutional, as the cases mentioned should have been vested exclusively in the supreme court."

Since this case was decided, in 1857, we find no case in any federal court where the constitutionality of the act of 1789, in relation to consuls, has been disputed, and it is very questionable if there is any doubt at the bar at this day as to the question. If there is no doubt—no question as to the power of congress to confer jurisdiction upon the inferior courts—in cases affecting consuls, why should there be in cases where a state is a party, since, as Justice NELSON well says, "the grant is in the same clause and on the same terms?" The motion to remand this case to the state court, from which it is brought here, is denied, with costs.

The lands involved in this case were the university lands of the state of Texas, situated in McLennan county, about 11 leagues in extent, and very valuable.

See S. C. 12 FED. REP. 1.

SAYER and others v. LA SALLE & PERU GAS-LIGHT & COKE  
Co. and others.*(Circuit Court, N. D. Illinois. March, 1880.)*

## 1. REMOVAL OF CAUSE—CONTROVERSY BETWEEN PARTIES.

It is the duty of the court, on application for removal of the cause into the circuit court, to inquire into the interest the various parties have in the controversy, and to classify them on one side or the other in accordance with their interest; and if, when thus classified and arranged, it appears there is a controversy between citizens of different states, the cause is properly removable.

## 2. SAME—JURISDICTION, WHEN NOT TAKEN.

Where this court could not proceed with the cause without acting directly on the decree rendered in the state court, and the equity claimed by the bill could not be given to plaintiffs without interfering with that decree, this court will decline to take jurisdiction.

In Equity.

*G. S. Eldridge*, for complainants.

*J. S. Cooper*, for defendants.

DRUMMOND, C. J. A bill was filed in the state court by the plaintiffs as bondholders of what may be termed the old La Salle & Peru Gas-light & Coke Company, under a mortgage given by that company to secure a loan of \$40,000. B. F. Allen was the trustee under that mortgage. The interest on the bonds was paid for several years, when default was made in the payment of interest. Between the execution of the mortgage and default in the payment of interest there was a claim filed against the company for a mechanic's lien on the property covered by the mortgage. A decree was rendered in the same court in which this bill was filed, and the property was sold under that decree for a comparatively small sum; and the Peru & La Salle Gas-light Company, a new company, claims to be the owner under the sale made on the judgment in the mechanic's lien case.

This bill alleges that that judgment was fraudulent, and asks that it be opened or set aside. It alleges further that although Allen, the trustee of the mortgage already referred to, was made a party, still, that he was a non-resident, and did not appear, and was brought in only by publication, and that he took no part and made no defense in the mechanic's-lien case. The bill further alleges that the new gas company has given a mortgage on the same property, and the main object of this bill is to enforce the prior mortgage on the property, and also a prior lien as claimed over the last mortgage, as well as the decree or judgment rendered in the mechanic's-lien case. The

bill also alleges that some of the defendants are owners of bonds under the first mortgage. Application was made in the state court to remove this cause to the federal court, and it was accordingly removed. A motion is made now in this court to remand the cause for the reason that it was not properly removable under the statute.

I think the motion must be sustained. Under a recent decision of the supreme court, (*The Removal Cases*, 10 U. S. 457,) it is made the duty of the court, in order to determine whether or not, under the act of 1875, the cause can be removed, to inquire into the interest which the various parties may have in the controversy, and to classify them on one side or the other, not merely as they happen to be plaintiffs or defendants, but in accordance with their interest; and if, when thus classified and arranged, it shall appear there is a controversy between citizens of the different states, then the cause is properly removable. Under this principle, I think, it may be said that there is not a controversy solely between citizens of different states. But, independent of that, it seems to me that it is hardly practicable to proceed with the litigation in this case without the court acting directly upon the decree which was rendered in the state court in the mechanic's-lien case. The equity claimed by this bill could not be given to the plaintiffs without interfering with that decree, which would be contrary to all recognized principle. So, on both grounds, and particularly the last ground named, it seems to me that this court ought not to take jurisdiction of the case, and it will, therefore, be remanded to the state court.

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### HAYDEN v. SNOW and others.

(Circuit Court, N. D. Illinois. October, 1880.)

#### 1. EQUITY—JURISDICTION.

When a court of equity has once obtained jurisdiction of the parties and subject-matter of a suit, it will retain it for the purpose of doing complete justice between the parties.

#### 2. MISTAKE IN DEED OR MORTGAGE—INNOCENT PURCHASER.

The parties to a mortgage cannot set up a mistake therein against the innocent purchaser of the notes and holder of the mortgage debt, nor can an agreement to assume a mortgage, by mistake inserted in a deed conveying land subject to such mortgage, be released from or released by mortgagor after a transfer of the mortgaged notes, and a recovery against the grantor for any deficiency after foreclosure thus precluded.

In Equity.

*R. B. Bacon*, for complainant.

*Smith & Burgett*, for William Drury.

BLODGETT, D. J. The bill in this case was filed to foreclose a mortgage dated July 28, 1875, given by Solomon Snow and wife to secure the payment of two notes, of even date with the mortgage, for \$6,000 each, payable in two and three years, respectively, to the order of the maker, and by him indorsed to J. E. Lockwood; said mortgage being subject to a prior incumbrance by trust deed to E. C. Larned, as trustee, to secure the payment of \$28,000. The bill alleged that Solomon Snow, after the making of the mortgage in question, on the fourteenth day of December, 1875, sold and conveyed the mortgaged premises to William C. Snow, subject to the said two incumbrances, and that William C. Snow, on the twenty-eighth day of January, 1876, conveyed the premises to Isaac M. Daggett, subject to the same incumbrances, and that Daggett, on the twelfth day of April, 1876, conveyed the premises to the defendant William Drury, subject to the said two incumbrances; and by the deed from Daggett to Drury the latter agreed to assume and pay the said incumbrances; and that the said incumbrances formed a part of the consideration or the purchase price for the said premises, which agreement was in the following words:

"Subject to a certain trust deed, executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure the payment of \$28,000, dated July 28, 1875, due in five years from date, with interest at 10 per cent. per annum, payable semi-annually, and also subject to another trust deed, executed by Solomon Snow and wife to R. B. Bacon, to secure the payment of \$12,000, dated July 28, 1875, due two and three years from date, with interest at 8 per cent. per annum, payable semi-annually, both of which said incumbrances the party of the second part herein agrees to assume and pay."

The bill further alleges a default in the payment of the interest due on the notes, which fell due April 28, 1877, which default, by the terms of said mortgage, allowed the holder of said notes to elect to declare the whole principal sum thereby secured, and the interest thereon, due and payable at once, and that such election has been made.

The bill further charged that the said Joseph E. Lockwood, to whom Solomon Snow indorsed said notes, on the first of November, 1876, for a valuable consideration to him in hand paid, assigned and transferred said two notes to the complainant, who is now the legal owner and holder thereof.

In the original bill the complainant prayed for a foreclosure of the mortgage and sale of the mortgaged premises, and in case the proceeds should not be sufficient to satisfy the amount due, then for a personal decree for the deficiency against the said defendant Drury.

Drury answered, admitted the making of the notes and the mortgage, the conveyance of the mortgaged premises from the mortgagor to William C. Snow, and from Snow to Daggett, and from Daggett to himself, and that the deed from Daggett to himself contained the clause of assumption as set out in the bill, but denied that there was any agreement between himself and Daggett that he should assume and pay the said incumbrances; and that it was not the intention of the parties of the deed that he should assume said incumbrances, and that the clause in said deed expressing such agreement was inserted therein by the mistake of the scrivener who drew the same; and that he (Drury) accepted said deed without the knowledge that it contained said clause, and did not become aware of the fact that it did contain said clause until some time in July, 1877, when Daggett, for the purpose of correcting the mistakes of the scrivener, and effectuating the intention of the parties to the deed, executed and delivered an instrument, under seal, releasing the defendant Drury from the obligations to pay the said incumbrances.

On February 17, 1880, complainant filed a supplemental bill, stating in substance that since the filing of the original bill a bill had been filed in this court against the said Drury and others by Robert E. Kelly, the holder of the indebtedness secured by the first mortgage for \$28,000, and that such proceedings had been had in said cause that on the twenty-seventh day of June, 1878, a decree of foreclosure had been entered upon the said mortgage, and that upon the twenty-sixth day of July, 1878, the mortgaged premises were sold for the satisfaction thereof, and that no redemption had been had from said sale, and a deed had been made to the purchaser by the master in chancery on the thirtieth day of October, 1879, and prayed that the amount found due by the master in this cause be entered by this court against the defendant William Drury, in accordance with the assumption of the said indebtedness.

Drury's answer to the supplemental bill admits the exhaustion of the proceeds of the mortgaged premises by the foreclosure of the first mortgage, and refers to his answer to the original bill, which he prays may be taken as a part of his answer to the supplemental bill.

The proof in this cause is mainly applicable to the questions of the fact whether or not the defendant Drury, in the purchase of the equity of redemption of the mortgaged premises, agreed, as part of the transaction, to assume and pay these two mortgage debts, and whether or not the clause of assumption in the deed from Daggett to Drury truly expressed the contract between the parties as to the payment of the said indebtedness.

From a careful consideration of the testimony I have come to the conclusion that it was not the agreement or intention of Daggett and Drury that Drury should assume and agree to pay the indebtedness secured by these two mortgages, and that the clause in the deed to him, whereby he was made to assume and agree to pay them, was inserted without his knowledge, and by mistake of the attorney who prepared the deed.

My reasons for this conclusion are—

*First.* That the preponderance of evidence on the question is largely in favor of the defendant. The testimony of Daggett, Whipple, and the defendant Drury on this point is so full and circumstantial as to leave almost no room for doubt on the question. They all testify unequivocally that it was expressly understood that Drury was not to assume the incumbrances, or either of them, and Drury said that he had no knowledge of the assumption clause in the deed to him until his attention was called to it by Mr. E. C. Larned, in April, 1877.

*Second.* There was no motive or inducement for Daggett to exact such terms from Drury, his grantee, as Daggett had not assumed or agreed to pay the indebtedness. There was, therefore, no reason why he should gratuitously interest himself in securing a contract from Drury for the benefit of the mortgagee.

*Third.* The nature of the transaction weighs heavily against the probability that any sane business man would have assumed such a liability. The proof shows that Drury exchanged a farm in Mercer county, this state, for this and two other pieces of heavily-incumbered Chicago real estate; that the transaction took place in 1876, and that on the twenty-fifth of July, 1878, only a little over two years afterwards, the property in question was sold under the decree of foreclosure on the first mortgage for \$28,000, and that no surplus was obtained by such sale to apply on this mortgage. This circumstance, in my mind, tends strongly to corroborate the testimony of Daggett, Whipple, and Drury that Drury only intended to purchase the equity, but did not intend to assume the prior indebtedness. He might have been willing to give his farm for the chance that all these three pieces of property would realize something over and above incumbrances, but it is hardly reasonable to believe, in view of what must have been its then value, that he would have assumed so grave a responsibility as to make himself personally liable for this heavy prior indebtedness. It is true that Mr. Hutchinson, who drew the deed from Daggett to Drury, testifies that he must, from the course of business, have drawn the

deed according to instructions, and would not have inserted this assumption clause unless directed to do so; but his directions may have come from some one who had no authority in the premises, or who was acting under a mistake or misunderstanding as to the terms of the contract.

Two questions of law arise upon the facts in this case as I now find them:

*First.* Can the complainant maintain this bill solely for the purpose of obtaining a personal decree against the defendant Drury, assuming that he did agree to pay the mortgage debt held by the complainant?

*Second.* It appearing as an admitted fact in the case, as it is alleged in the bill and not denied in the answer, that the complainant purchased the notes secured by this mortgage in November, 1876, for value, before any default or maturity thereof, and after the defendant Drury had by the deed to him which then appeared of record apparently assumed to pay this mortgage debt, can he now be heard to say, as against this complainant, that he did not assume such payment? In other words, must the court presume that the complainant purchased these notes upon the faith of Drury's assumption and agreement to pay the same?

As to the first question, it is an established rule that when a court of equity has once obtained jurisdiction of the parties and subject-matter it will retain it for the purpose of doing complete justice between the parties.

The bill in this cause was filed for a foreclosure of the mortgage in question. The citizenship of the parties brought the subject-matter within the jurisdiction of the court. The relief prayed was such as the court was adequate to give. It could not only award a decree of foreclosure and sell the mortgaged property, but could, under the ninety-second rule in equity, award a personal judgment against whoever was liable for any deficiency after the application of the proceeds of the sale, and it seems quite clear to me it does not lose that jurisdiction by the fact that the subject-matter of the mortgage has been sold by another decree to satisfy a prior incumbrance. The court can now, if it were deemed necessary, enter a decree of foreclosure, and direct a sale of the mortgaged premises, and, after a sale for a nominal amount, could give a personal judgment for the deficiency; but for my part I do not deem it necessary to go through an empty form of foreclosure and sale, to ascertain what the court knows judicially already, that the mortgaged property will furnish no fund to satisfy this mortgage debt.

There is, however, another aspect of this cause upon which the jurisdiction of the court to enter a decree on the merits of this cause may be retained.

The complainant seeks by his bill to make a remote grantee of the mortgagor personally liable for this indebtedness. In a number of cases like this, where the assumption and agreement to pay the mortgage debt was declared to be a part of the purchase money or consideration for the deed of the mortgaged premises, the courts have held the grantee in the deed liable, on the ground that he by his deed acknowledged himself to hold so much money for the use of the mortgagee; and in those cases, it has been said, a suit at law could be maintained by the mortgagee against the grantee of the mortgagor. *Burr v. Beers*, 24 N. Y. 178; *Thompson v. Thompson*, 4 Ohio St. 333; *Sanford v. Hayes*, 19 Conn. 594. But in this case there is no admission that the assumption of the mortgage debt is a part of the consideration. The recital in the deed to Drury is to the effect that he assumes and agrees to pay this incumbrance. He does not admit nor declare that a part of the purchase money is to be paid by him (Drury) in payment of this mortgage indebtedness, as was the contract in many of the cases I have cited, so that this case is brought by its facts more directly within the rule of the cases adjudicated in New Jersey and Massachusetts, which hold that the liability of the grantee of the mortgagor, who has assumed the mortgage debt, can be enforced in equity by an application of the principle of equitable subrogation. From these various considerations I have, therefore, no difficulty in reaching the conclusion that the court still has jurisdiction to pass upon the question of Drury's liability, and to render a personal decree against him, if justified by the law and facts.

As to the second question, it appears from allegations in the bill, which are not denied by the answer, and are admitted, that the complainant purchased the notes secured by this mortgage for a valuable consideration, before due, in November, 1876, and after the deed from Daggett to Drury had been made; and by the well-settled law of this state, where this transaction took place, and all the parties resided, the assumption of this indebtedness by Drury inured to the benefit of the mortgagee, and could be enforced by him either at law or in equity. The mortgagor in this case was the holder of these notes; that is, these notes were given to be negotiated, made payable to the order of the mortgagor, and the mortgage passed with the notes as an incident, free of the equities between the original parties.

The case of *Carpenter v. Longan*, 16 Wall. 271, sustains fully the doctrine which I have laid down here, that the parties to a mortgage



cannot set up a mistake as against the purchaser of the notes and the holder of the mortgage debt.

The same doctrine was affirmed in the case of the *New Orleans Canal & Banking Co. v. Montgomery*, 95 U. S. 16.

The court must therefore presume that when the complainant purchased these notes she took them with knowledge of the fact that the defendant Drury had assumed and agreed to pay them, and that the obligation could be enforced by the holder of the notes. The defendant Drury had by this deed made himself, apparently at least, a *quasi* party to the notes. He had agreed to assume and pay these notes, and thereby had given them, the court must presume, currency in the market. The mortgagee—that is, the *bona fide* holder of these notes—is, to the extent of this mortgage, a purchaser of the mortgaged premises. *Jones, Mortg.* (1st Ed.) § 710.

In *Pierce v. Faunce*, 47 Me. 507, the court says:

“A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage without notice is on the same footing with a *bona fide* mortgagee in all cases. The reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects.”

In this case the defendant Drury seeks to avoid the effect of the assumption of the debt on the ground of mistake, and the case seems to me to stand on precisely the same ground that it would occupy if he had filed a bill in equity to reform the deed upon the ground that the assumption clause was inserted in it by mistake; and the rule is well settled that such a mistake cannot be rectified to the prejudice of an innocent purchaser for value, (*Story, Eq. Jur.* § 165; *Sickmon v. Wood*, 69 Ill. 329;) and if Drury could not be allowed to reform the deed by direct proceedings for that purpose as against the *bona fide* holder of this mortgage and notes, who has purchased them on the faith of this assumption appearing on the record, it is equally clear that he cannot be allowed to set up that defense in this cause.

I therefore conclude that while, as between Drury and Daggett, this clause of assumption was wrongfully inserted, or at least improperly inserted, in the deed, yet such mistake cannot be set up against the complainant, who has purchased these notes on the faith of Drury's apparent assumption of them, which then appeared of record; and I also hold that the release deed made by Daggett to Drury from this assumption must be deemed inoperative as against com-

plainant, and the decree will be for the complainant against Drury for the amount of the mortgage debt.

The case shows that there has been a reference to the master, and a report made on it some time in November last of the amount due, as stated by the master, and I give a personal judgment for the amount, and interest from the date of the master's report.

See *Stinson v. Hawkins*, 13 FED. REP. 835.

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NORTHERN PAC. R. CO. v. KINDRED and another.

SAME v. SAME and others.

NORTHERN PAC. R. CO. v. POWER and others.

SAME v. POWER.

(Circuit Court, D. Minnesota. October, 1881.)

1. EQUITY—LACHES—RESCISSION OF FRAUDULENT CONTRACT.

Equity will not presume a ratification of a fraudulent contract by the injured party; no particular form of rescission is required, and if he files his bill to set it aside with reasonable promptness he will be entitled to relief.

2. PRINCIPAL AND AGENT—PROFITS OF AGENCY BELONG TO PRINCIPAL.

Where an agent has fraudulently made profits out of his agency at the expense of his principal, he shall account to his principal for all such profits, and shall be allowed only the actual value of whatever he turns over to his principal; and if it be property purchased in the course of his agency, what he paid for it shall be considered its value.

3. SAME—PLEADING—NECESSARY PARTIES.

In a suit to compel an agent who has fraudulently conspired with others to obtain title to the lands of his principal, to account therefor, and to have the sales of said lands set aside, the only necessary parties are the persons who have some *present* interest in the controversy, and against whom the complainant has a right to a decree for relief. Those used as the instruments of the fraud, who in pursuance of the conspiracy conveyed to others the title once vested in them, are not necessary parties.

4. SAME—CHARGING CONSPIRACY.

Where the conspiracy charged is *one*, though embracing within its scope many transactions, one suit is sufficient.

5. SAME—OTHER FRAUDS.

Allegations of other frauds that cannot be specified because of their concealment by defendants, are sufficiently certain and not demurrable.

*Gilman & Clough*, for plaintiff.

*C. K. Davis*, for defendants.

McCARY, C. J. These cases are before us on demurrers to the bills. We will consider the several questions discussed by counsel in the order in which they have been stated in the argument.

1. It is insisted that it appears by the bills that complainant has been guilty of laches in the premises, and has for so long a time acquiesced in the contracts, acts, doings, and omissions complained of, with full knowledge thereof, as to bar it from the relief prayed. To support this proposition the counsel for respondents invokes the doctrine that where a contract is obtained by fraud, and the party defrauded desires to rescind on that ground, he must, upon the discovery of the fraud, at once announce his purpose and adhere to it. *Grymes v. Sanders*, 93 U. S. 62, and cases there cited. We are of opinion that these are bills brought to set aside certain alleged fraudulent contracts entered into by complainant in ignorance of the fraud, and that it would, therefore, be a good defense to show that the complainant, after knowledge of the fraud, acquiesced in the contracts, or that it failed, upon being advised of the facts constituting the fraud, to repudiate them. Counsel for complainant insists that this is a matter of defense, and must be pleaded and established by the respondents; that it was not necessary by averments in the bill to anticipate such defense. Whether this position of the complainant's counsel is correct or not need not now be determined, because in three of the cases the bills contain the allegation that the fraud had been very recently discovered, and in the remaining case counsel say that a similar allegation was omitted by a clerical error, it being their purpose, out of abundance of caution, to insert the averment in all the cases. It may, therefore, be now inserted in the one case in which it is omitted. But it is further insisted that the bills are bad on their face because they do not aver that complainant at once, upon discovering the fraud, repudiated and rescinded the fraudulent contracts. In one case the allegation is that the fraudulent acts were not discovered "until within a few weeks last past;" in another, that the complainant had no knowledge of the fraud "until within a few days last past;" and in a third, the discovery is averred to have been made "within the three months last past."

We hold that these averments do not upon their face affirmatively show that complainant has been guilty of laches, nor that it has done anything to condone the frauds complained of, or to ratify the contract alleged to be fraudulent. It is true, however, that, even within the short period here named, the complainant may have acquiesced in the contracts, and by its acts may have confirmed them.

If this is so it must be pleaded as a defense and established by proof. Equity will not presume a ratification of a fraudulent contract by the injured party, if he files his bill to set it aside with reasonable promptness. No particular form of rescission is required. It need not be in writing. It is enough if from the time of discovery of the fraud the party injured abstains from any acts recognizing the fraudulent contract, and that within a reasonable time he brings suit or takes some other active measures to set it aside. A different rule as to pleading prevails where the bill shows upon its face that it is barred by the statute of limitations. In such a case the bill is demurrable, and if it be a bill for relief on the ground of fraud, filed after the time limited by law or the principles of equity for the filing of such bills, it must be alleged that the fraud was not discovered until within that period. *Moore v. Green*, 19 How. 69.

2. It is insisted that the bills are fatally defective for that the complainant has not tendered, and does not offer to restore, the property which it received in exchange for the land sold, and insists upon its right to retain the same and pay to respondents only its just cost to them. The averment in the several bills is, in substance, that respondents Power and Kindred were employed by complainant as its agents respecting the care, management, and sale of certain lands of the complainant; that as such agents the duties of said respondents were, among other things, to negotiate sales of complainant's lands, and in complainant's name and behalf to enter into written contracts for such sale, to be made only to *bona fide* purchasers, and at fair prices, and to collect and pay over to complainant the proceeds of sales, whether in money or in preferred stock of complainant; and in general to look after and promote the interest of complainant in all things concerning the care, management, valuation, and sale of complainant's said lands. The preferred stock here referred to is alleged to have been the preferred stock of complainant which was outstanding, and the shares of which were receivable upon certain terms in payment for lands sold at its par value. An examination of the several bills will show that, if they are true, the respondents Power and Kindred, while acting as such agents for complainant to make sales of its lands, undertook to purchase for their own use and benefit large quantities of the most valuable of the lands by having them conveyed to third parties who were to hold or convey for them, and by obtaining complainant's preferred stock in the market and delivering it to complainant in payment for such lands, representing it as the stock paid in by the persons named by them as purchasers. In such a

case the defrauded principal, when he is advised of the conspiracy and fraud, and repudiates the contracts made in pursuance thereof, is not bound to return to the dishonest agent anything beyond what has been received from him on account of the fraudulent transactions.

An agent will not be permitted to make any profit out of transactions connected with his agency, and if he be an agent to sell property he must not be allowed to purchase it. These doctrines are elementary. *Michoud v. Girod*, 4 How. 503; *Devoue v. Fanning*, 2 Johns. Ch. 252; *Moore v. Moore*, 5 N. Y. 262; *Gardner v. Ogden*, 22 N. Y. 347; *Conkey v. Bond*, 36 N. Y. 427; *Cook v. Woolen Mill Co.* 43 Wis. 433; Story, Ag. §§ 210, 211; Kerr, Fraud & M. 174, 175, and cases cited.

If an agent shall make any profits in the course of his agency by any concealed arrangement, either in buying or selling, or other transactions on account of the principal, such profits will belong exclusively to the latter. Bigelow, Frauds, § 214. In the light of this doctrine we must construe and apply the rule upon which the counsel for the respondent relies. That rule may be thus stated: A party to a contract who seeks to rescind it for fraud must, upon discovery of fraud, offer to return whatever he has received upon the contract. *Farmers' Bank v. Groves*, 12 How. 57; Perry, Trusts, § 195. This rule, no doubt, applies here; but under it, in the light of the other doctrine above stated, what must complainant return to respondents? Clearly nothing; that is, in the nature of profits made in or growing out of the fraudulent transactions, for these were in equity the property of the complainant from the moment they came into the hands of its agents. The stock, therefore, which the complainant received on account of the transactions in controversy was the consideration, and the only consideration, which complainant received for the contracts now sought to be set aside; and that, or what respondents paid for it, is all that complainant is bound to account to respondents for upon settlement, if the allegations of the bill are established. Where such an accounting is prayed, and it is averred that the sum due from the agent to the principal is larger than that received from the agent on the contract, it is not necessary that the principal, upon filing his bill, should actually pay back the money or property received on the contract; it is enough if he offers to credit it to the agent on settlement. In this view of the law the allegations now under consideration are deemed sufficient.

The bills pray for an accounting for the proceeds of any lands acquired by the respondents in the manner set forth, and afterwards

sold by them, after deducting from said proceeds the actual cost of the preferred stock turned over to the complainant. This we conceive to be the correct basis for an accounting in such cases as are set forth in these bills. It may be that the stock is now worth more than at the time it was purchased by defendants and delivered to complainant. If so, to require complainant to return the identical stock, or its present market value, would be to pay to the respondents a profit to which, if the bills are true, they are not entitled. I know of no rule applicable to cases of this character which can be reduced to practice consistently with the principles of equity, except the following: Where an agent has fraudulently made profits out of his agency at the expense of his principal, he shall account to his principal for all of such profits, and shall be allowed only the actual value of whatever he turns over to his principal; and if it be properly purchased in the course of his agency, what he paid for it shall be considered its value. He shall gain nothing by his frauds, and should consider himself fortunate, and the law very merciful, that he is allowed to escape actual loss.

3. It is insisted that in some of the cases the bills show a want of necessary parties, because the persons in whose names the respondents made purchases, and who afterwards conveyed as directed by respondents Power and Kindred, are not made parties. This point is not well taken. The only necessary parties are the persons who have some present interest in the controversy, and against whom the complainant has a right to decree for relief. The persons who are alleged to have been used as the instruments of the fraud, and who have, in pursuance of the conspiracy, conveyed to others the title which was once vested in them, are not necessary parties.

4. It is said that some of the bills are multifarious, because each particular transaction charged is several in character,—distinct from all the others,—and should be the subject-matter of a separate suit. The charge is a fraudulent combination and conspiracy entered into for the purpose of defrauding the complainant by obtaining its lands for less than their value, and through the fraud of its agents. The conspiracy is charged as one conspiracy, embracing within its scope numerous transactions. If such be the fact one suit is sufficient. Story, Eq. Pl. §§ 285, 285a, 286, 286a.

5. Has the complainant a remedy in equity against Power alone upon the facts stated in the bill against him? We think so. It is clearly a bill to set aside a fraudulent contract, and for discovery and an

accounting. We have already held that the offer to return the stock or the sum paid for it by the respondents is sufficient; and this disposes of the only ground upon which this objection is urged.

6. We think the bills contain a sufficient allegation of title in complainant to the lands described therein. It is averred that prior to the employment of Power and Kindred as its agents the complainant had acquired said lands under the acts of congress mentioned, and by reason of the construction of portions of said line of railroad. This is sufficient.

7. Respondents object to certain general allegations of fraud in two of the bills. These, in substance, charge that the defendants Power and Kindred have been guilty of practices like those specifically set forth in respect to numerous tracts of land of the complainant other than those set forth; but as to the number of instances in which they have been guilty of such practices, and as to the description of the tracts and the details of such transactions, the complainant is ignorant, for the reason that respondents have concealed the same from complainant, and the complainant has not been able to discover the same. Allegations of this character are not demurrable. They show upon their face a sufficient reason for not being more specific, in that they aver concealment by the respondent. The facts, when discovered, may be set out by way of amendment. This allegation may stand, if for no other purpose, as a foundation for an amendment of the bill hereafter if further facts are discovered. It is, however, probably true that no decree could be based upon this general allegation as it stands.

We are of opinion that, upon the amendments of the bill in the case first named so as to aver recent discovery of the facts constituting the alleged fraud, the demurrers should be overruled. So ordered.

NELSON, D. J., concurs.

## GRAY and others v. JONES, Assignee, etc., and others.

*(Circuit Court, W. D. Missouri, W. D. October Term, 1882.)*

## 1. EQUITY—TITLE NOT ACQUIRED UNDER FORGED DEEDS.

Purchasers from the grantees in deeds that have been forged acquire no title to the lands conveyed that a court of equity can protect.

## 2. SAME—PLEADING—TITLE.

Complainants must in their bill allege and prove their own title to the lands claimed; they cannot recover by showing that defendants have no title thereto.

## 3. PATENT FOR LAND—ASSIGNOR AS TRUSTEE.

A certificate of entry or location under a military land-warrant vests in the holder an equitable title to the land, and gives him a right to the patent when issued; and if he conveys the land, or assigns the certificate and afterwards obtains the patent, he becomes, under the statute, (Rev. St. § 2414,) as well as upon the plainest principles of equity, a trustee for the person to whom he had previously sold or assigned.

## 4. STATUTE OF LIMITATIONS—OWNERS OF UNOCCUPIED LANDS.

The statute of limitations does not run against the owner of unoccupied lands until some one assumes to take adverse possession; and this rule applies as well to an assignee in bankruptcy, who, under the Revised Statutes, § 5057, must bring suit within two years as to the original owner.

## 5. JURISDICTION—HOLDER OF EQUITABLE TITLE.

Where complainants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust for them, the jurisdiction of a court of equity in nowise depends upon possession by complainants of the land.

This is a suit for decree for title for about 1,400 acres of land in Nodaway, Atchison, and Holt counties, Missouri. The bill sets out that Hugh B. Sweeny was on March 11, 1857, the owner of certain military bounty land-warrants; that on March 12 and 13, 1857, he located them on certain lands in controversy in this suit; all these lands were located by Sweeny in his own name; that on April 13 and August 3, 1857, Hugh B. Sweeny, for a valuable consideration, transferred these certificates of location to James S. Phelps; that the assignments of these certificates of location were duly acknowledged, and part of them recorded; that Phelps paid the taxes on this land. The bill sets out that the complainants furnished part of the money to Phelps to enter this land; Phelps furnished one-fourth, Bernard one-fourth, and Henry Young one-half; Young furnished \$2,300, Bernard \$1,027.70; all the lands were bought in the name of Phelps; all the certificates of location were assigned to him; that he paid taxes on this land until the year 1868, and Jones, his assignee, has paid taxes on these lands ever since; Phelps delivered all the title papers to Jones, his assignee in bankruptcy; that Sweeny represented



that these assigned certificates were equal to a warranty deed, and therefore Phelps took no steps to get patents in his own name. No attempt was made to record these certificates of location until the year 1861, four years after Phelps got them. The bill sets out that if the assigned certificates of location had been filed in Washington, patents would have been issued in the name of Phelps. The bill charges that the patents to these lands were issued to Sweeny shortly after the assignments were made, but these patents remained in the possession of the government of the United States until 1871 or 1872, when they were taken out. The bill sets out that until the delivery of the patents the legal title remained in the United States, and that complainants knew nothing of the patents being issued to Sweeny until 1879 or 1880. Sweeny died in the year 1869, and his heirs are parties to this suit. After the assignment Sweeny claimed no interest in this land, and his heirs claim none now. His heirs have been called upon to convey the legal title, but they refuse to do so. The bill charges that on the second of March, 1872, a deed dated March 22, 1864, signed by Hugh B. Sweeny and duly acknowledged, was filed for record in the office of the recorder of deeds in Nodaway county, Missouri, said deed embracing the lands in controversy in this suit. The bill charges that this deed was a forgery. This is a deed from Hugh B. Sweeny to John Sullivan, of New York. The bill then sets out that Sullivan made a power of attorney to one Richard F. Barrett. Barrett, as Sullivan's attorney, sold and conveyed part of these lands to Grant, Grant to Dubois, and the latter to Welton Grant; and the other lands to the other defendants by several separate deeds. The bill sets out all these deeds; when and where made, acknowledged, and recorded. They are all set out as pretended deeds, and they are charged to be frauds on the complainants; that all of the defendants had full notice and knowledge of the complainants' rights. All these deeds are set out as warranty deeds. The bill charges that Barrett, the attorney, had been engaged in frauds and fraudulent and nefarious contrivances in respect to lands in north Missouri, and in the counties of Nodaway, Atchison, and Cooper; that Barrett was a very suspicious character, and that he had been engaged for years in perpetrating similar frauds, and that his conduct always excited suspicion; that all these deeds were made by all the parties, and received with full notice and knowledge of complainants' rights, and with a view to cheat and defraud the complainants. The bill sets out that notwithstanding the certificates were assigned to Phelps, Sweeny had the legal title, and Phelps the equitable title in trust for

the complainants; Phelps went into bankruptcy in 1868; that in 1880 the complainants took possession of all the lands in Nodaway county. The bill prays for a decree for the legal title. These are the allegations of the bill. The answer of the defendants Grant and Dubois denies all title certificates of location and the land in the complainants; they deny all notice or knowledge of any such title; they deny that they have now or ever had any title; they admit all the deeds made to the several defendants, but they deny that these deeds were pretended deeds; they deny all forgery of any deed. The answer says that all these deeds were made in good faith, for valuable consideration, and without notice; that all the purchase money was paid without any notice of any title in complainants, or any of them. The answer denies all fraud, all collusion, forgery, and unlawful combination. This answer also sets up the statute of limitations of 10 years as a bar to this suit. The complainants filed a general replication. These are all the pleadings.

*Botsford, Williams & A. C. Widdecombe*, for complainant.

*L. H. Waters*, for Allen.

*Karnes & Ess*, for Grant.

*R. S. Musser*, *pro se* and for *R. H. Musser*.

McCRARY, C. J. 1. The court finds from the evidence that the deeds from Sweeny to Sullivan, from Sweeny to DeBow, and from DeBow to Bowen, mentioned in the bill, were not executed as they purport to have been by the respective grantors, but were forged, and upon the fact so found the court holds as matter of law that the purchasers from the grantees in said deeds acquired no title which a court of equity can protect. *Sampeyreac v. U. S.* 7 Pet. 222.

2. As to several of the tracts of land claimed by complainants, the point is made that they are not described in the certificates of location, which are the foundation of the action. The point is well taken and must be sustained. The complainants must make out their case by positive competent proof, and this is not done by showing that defendants have no title. A certificate of location, calling for land in section 20, does not entitle the holder to a decree for land in section 21; nor will a certificate, calling for the W.  $\frac{1}{2}$  of a particular tract, support a claim for the E.  $\frac{1}{2}$  of the same tract. There is no mistake apparent upon the face of the certificates, much less anything to show that some other and different tract was intended; and there is no allegation or mistake in the bill, and no prayer for relief on that ground, or by way of reformation of the instruments. There is nothing on the face of the papers to put a purchaser of property not de-

scribed therein on inquiry, and certainly nothing to indicate an intention to convey the tracts now claimed. *Scoles v. Wilsey*, 11 Iowa, 261.

3. As to all the lands correctly described in the certificates of location, the assignment of the certificates by the locator, Sweeny, to James S. Phelps vested in the latter all the right, title, and interest of the former, so that when the patents were subsequently issued in the name of Sweeny, he took in trust for the owners of the equitable title. A certificate of entry or location under a military land-warrant vests in the holder an equitable title to the land, and gives him a right to the patent when issued. If the holder of such a certificate conveys the land, or assigns the certificate, before the patent issues, and a patent is afterwards issued to him, he becomes, upon the plainest principles of equity, a trustee for the person to whom he had previously sold or assigned. By statute all warrants for military bounty land, and all valid certificates of the same, were made assignable, "so as to vest the assignee with all the rights of the original owner of the warrant or location." Rev. St. § 2414. Sweeny had made a location and entry of the land-warrants held by him, which vested the equitable title in him and entitled him to the patent. *Wirth v. Branson*, 98 U. S. 121. And under the statute, as well as upon general principles, the assignee of the certificates succeeded to all Sweeny's equities, and when the patents issued in Sweeny's name he took in trust for his assignee. *Landis v. Brant*, 10 How. 348; *Massey v. Papin*, 24 How. 362; *Moore v. Maxwell*, 18 Ark. 469; *Key v. Jennings*, 66 Mo. 366.

4. The equitable title is in complainants and Stephen E. Jones, assignee in bankruptcy of James S. Phelps. The proof shows that the land was purchased and paid for by complainants and said Phelps, and the interests of the several parties, as established by decree of the United States district court for the district of Kentucky in the year 1872, (which, as between the parties, must be taken as final,) is as follows: The heirs of Young are entitled to one-half, S. M. Bernard to one-fourth, and Stephen E. Jones, assignee, to one-fourth. The parties are therefore entitled to recover in these proportions, unless the respondents have succeeded in establishing a good defense.

5. It is insisted that the complainants are barred by the statute of limitations or by laches, and that the respondent Stephen E. Jones, assignee, is barred by the two-years' limitation provided by section 5057 of the Revised Statutes of the United States. Some of the patents were

issued to Sweeny in 1859, and others in 1866. But the owner of unoccupied lands is under no obligation to bring suit to quiet his title until some one assumes to take adverse possession. Until then, the owner may rely upon his title, whether it be legal or equitable, and the statute of limitations does not run against him. The bar depends entirely upon adverse possession. *Elmendorf v. Taylor*, 10 Wheat. 168; *Pindell v. Mulliken*, 1 Black, 585. This suit was commenced in June, 1880. The court finds from the evidence that none of the respondents had, for 10 years prior to that date, held possession of the lands in controversy, or any of them, adversely to the complainants. It follows that the defense of the statute of limitations and of laches is bad as to complainants. This, however, does not determine the question of the right of Stephen E. Jones, as assignee in bankruptcy, to recover the one-fourth interest of Phelps; and this brings us to the question—

6. Whether said assignee is barred by the provisions of said section 5057 of the Revised Statutes which bars a recovery by an assignee in bankruptcy unless suit be brought "within two years from the time when the cause of action accrued." The same rule prevails under this statute as under the general statute of limitations,—the cause of action is deemed to have accrued when the hostile claim is asserted by adverse possession. *Banks v. Ogden*, 2 Wall. 57. It is admitted that the lands claimed by defendant Allen in Holt county were held by him adversely for more than two years prior to the commencement of this suit. As to those lands, therefore, the right of action of the assignee is clearly barred. As to the lands claimed by defendant Musser there was clearly no adverse possession prior to July, 1879, which was less than two years prior to the commencement of this suit. There is no evidence of adverse possession of the lands claimed by the other defendants, and it follows that, as to all the lands except those claimed by defendant Allen, the defense of the two-years' statute of limitation fails.

7. It is insisted that the bill should be dismissed for the reason that the complainants cannot maintain this action unless they are in the lawful and peaceful possession of the land sought to be recovered. The doctrine here sought to be invoked has no application to the case. The complainants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust for them. In such a case the jurisdiction in no wise depends upon possession. *Branch v. Mitchell*, 24 Ark. 431; *Smith v. Orton*, 21 How. 241.

The result is that there must be a decree in favor of complainants and respondent Stephen E. Jones, assignee, for the interest claimed by them respectively in all the lands in controversy in this case, except (1) those not described in the certificates of location; and (2) those adversely held by respondent Allen, situated in Holt county, as to which the right of action of said assignee is barred. The costs will be apportioned so that the respondents who claim lands not recovered by complainants shall pay no costs, and shall recover their costs. Decree accordingly.

KREKEL, D. J., concurs.

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NASH and others, Executors, etc. v. HEILMAN and others.

(Circuit Court, D. Indiana. March, 1880.)

EXECUTORS—BOND OF SURVIVING PARTNERS—ASSETS OF ESTATE.

Where a testator provided in his will that if his executors decided to collect from his surviving partners the money due to his estate, the amount should not be paid till a certain time had elapsed, the taking of notes by the executors for the amount due was not such action as released the sureties on a bond given by the surviving partners conditioned to pay "all sums of money that are now due or hereafter may become due."

In Equity.

Harrison, Hines & Miller, for plaintiffs.

Shackelford & Richardson and Denby & Kumler, for defendants.

DRUMMOND, C. J. This is a demurrer to the first paragraph of the complaint, by the defendants Heilman and Mackey, who are sureties upon the bond upon which this suit is brought.

The material facts which appear by the complaint are these: Thomas J. Hunt, and Semonen and Dixon, two of the defendants, in 1872 and prior thereto, were engaged in business, chiefly at Evansville, in the manufacture and sale of boots and shoes. Hunt was a resident of Massachusetts.

In the early part of January, 1873, Mr. Hunt died, leaving a will. The probate of the will was contested and the controversy continued for some time. Pending this a special executor or administrator was appointed to take possession of the property of the testator, and take care of it until the dispute about the will was settled—as it was ultimately by proof establishing the will. The present plaintiffs are the

executors of the will. One of them had resigned. Mr. Hunt, at the time of his death, supposed that the value of his interest in the firm amounted to a large sum, and upon that assumption made his will. He bequeathed various legacies to different persons, requiring the surviving partners to pay out of the assets of the firm about \$34,000, in order to satisfy the legacies which he had given by his will. He supposed that there remained a large amount due him from the firm after these legacies should be paid, and by a codicil to his will, of the thirty-first day of December, 1872, he declared that if the executors decided not to collect the amount which was due to him from the firm, (obviously implying that they might exercise the power of choice,) then it might continue in the firm for the benefit of his estate. But in case they did decide the amount should be collected, then he declared that it should not be paid until a certain time had elapsed; \$15,000, for example, were to be paid in four and a half years; \$15,000 in five years; \$20,000 in five and a half years; and whatever might be obtained afterward from the accounts of the firm which had been carried to profit and loss, if any collections should be made therefrom, the surviving partners were to have a reasonable time to pay. And there was a qualification also made to the general direction as to the payment of these amounts, viz.: that in case he was mistaken as to the amount that was due,—that is, if it were more or less than \$50,000,—then that fact was to modify the directions he had given.

While Thaxter, the special administrator, had control of the property, certain arrangements were made by the executors of the will with the surviving members of the firm in relation to the disposition of the stock of the firm which was on hand on the first day of January, 1873, and also as to certain accounts that might have been received up to a fixed time on account of goods sold, and the price which the surviving partners were to pay for that, was agreed upon. There was a controversy about this for a time, but ultimately it was arranged by a sum of money being received in cash and notes for the balance given. This settlement took place on the twenty-sixth of February, 1874, and the amount fixed was \$22,373.70, of which \$10,080.60 were paid in cash, and two notes given for the balance, payable in six and eight months respectively. It seems that Mr. Thaxter, believing that the surviving partners were not making a proper use of the assets of the firm, and by their conduct were jeopardizing the interests of the estate, on the fifth of March, 1874, filed

a bill in this court against Semonen and Dixon, asking for the appointment of a receiver, and for an injunction against them.

Thereupon the defendants appeared and filed an answer in which they set forth the facts which have been referred to; and they tendered with their answer the payment of a certain sum of money, and also the bond upon which this suit is brought. They state in their answer that not waiving their claim to the management of the partnership business, yet for the purpose of avoiding controversy as to the injunction, and appointment of a receiver or receivers as prayed for in the bill, they offered and brought into court with their answer their bond, with freehold sureties in the penal sum of \$100,000, the condition being that the said defendants Semonen and Dixon should well and truly perform their duties as the surviving partners of said firm, and the defendants also avowed their readiness to execute notes in accordance with the terms of the agreement which had been made to carry out the will of Mr. Hunt. The condition of the bond which was then filed was that if "the said Peter Semonen and George Dixon shall well and truly account for and pay over to the said ——— Thaxter, administrator, as aforesaid, and his successors, all sums of money that are now due, or may hereafter become due, from them, as surviving partners" of the particular firm of which Mr. Hunt was a member, to the estate of their leading partner, Thomas J. Hunt, deceased, "this obligation shall be void, else be and remain in full force and virtue."

When this bond was filed it was accepted by the plaintiff, and the application for an injunction and appointment of a receiver was waived, and the court thereupon directed the amount which was paid into court by the defendants to be paid to the plaintiff, and the bond which had been tendered to be given to the plaintiff, a copy being left on file in the court. On this bond the two defendants that demur, as I have said, were sureties, and the contention on their part is that after this bond was executed and delivered to the plaintiffs there were acts done by the executors of Mr. Hunt which should prevent the plaintiffs from recovering on the bond. The bond was dated on the twenty-fifth day of March, 1874, and the order of the court already referred to, accepting the money and the bond and ordering both to be delivered to the plaintiff, was made on the third of April, 1874.

After the probate of the will Mr. Thaxter ceased to be the special administrator, and the executors appointed under the will assumed control of the estate.

On the eighteenth of July, 1876, they made a settlement with Semonen and Dixon of all the matters in controversy, and fixed upon the amount due from the surviving partners to the estate of Mr. Hunt, and took four notes for the amount; all of which notes, as written, bear date the thirtieth of November, 1875. These notes were for \$15,865.61, payable the ninth of January, 1877; \$15,000, payable the ninth of July, 1877; \$15,000, payable the ninth of January, 1878; and \$20,000, payable the ninth of July of the same year, with interest at 7 per cent. This settlement which was made did not include the accounts on the books to profit and loss. Anything that might be collected from these accounts was to be paid over. These notes were all payable at the Merchants' National Bank of Evansville.

It was a part of the agreement and settlement that the suit which was then pending against the surviving partners was to be dismissed, and when the settlement was consummated the suit was dismissed accordingly. It does not appear by any allegation in the complaint that the sureties on the bond were parties to this proceeding, or in fact that they had any knowledge of this settlement.

The main ground upon which it is claimed the sureties are released from their obligation under the bond, as I understand, is because of this settlement made by the executors. It is said that the rights of the parties were changed in consequence of this settlement. At least, that is the inference in the argument, although not distinctly made. It is a question whether or not they were, from what took place.

It is alleged in the complaint that these notes were taken in accordance with the terms of the will of Mr. Hunt, and payable at the times then designated. It is alleged that three of the notes had been paid according to their terms, and that the last note,—the one for the \$20,000,—although demand has been made for its payment, still remains unpaid.

It is necessary to particularly examine and consider the terms of the will of Mr. Hunt, and the effect of this settlement made on the eighteenth day of July, 1876, and the condition of the bond, in order to decide this question.

The rule undoubtedly is that if, by agreement between the principals, time is given on the debt which is due after the obligation of the sureties is entered into, they are released.

The difficulty about this case is to say that there was time absolutely given on the amount that was due so as to release the sureties. The condition of the bond is that they were to pay all sums of money "that are now due, or may hereafter become due, from Semo-



nen and Dixon as surviving partners." Then the sureties agreed that Semonen and Dixon should pay to the estate of Hunt all sums that were then due or might thereafter become due. Of course the important question is what sums were then due and what sums thereafter became due, within the meaning of this condition of the bond. It cannot be said absolutely that there were any sums then due except those which are paid, and about which no controversy arises; for instance, the notes which were given at the settlement which was made between Mr. Thaxter and the surviving partners on the twenty-sixth of February, 1874. There seems to be no controversy in relation to that. The presumption is they were paid according to their terms. Therefore the only sums to which this condition of the bond can refer are those which remain to be paid by the surviving partners as the interest of Mr. Hunt in the assets of the firm.

Now, it is to be observed that by the terms of Mr. Hunt's will time was given on a certain contingency to the surviving partners for the payment of what might be due. And the allegation in the complaint is that these notes given in the settlement of the eighteenth of July, 1876, were in accordance with the terms of the will.

Then, was the arrangement which took place between the executors and the surviving partners as to the payment of what was due, such a change in the condition of the parties as existed on the twenty-fifth of March, 1874, as to entirely release the sureties from the obligation of their bond? I do not think it was. Certainly not as to the whole amount that was due. It will be recollected that the executors had a certain discretion as to a portion of the amount that was due to the estate; and upon the determination of that discretion the surviving partners were to have a number of years to make the payment. Now the presumption is that considering the circumstances under which this bond was executed—tendered in court, accepted by the court, and delivered to the plaintiff—that the sureties must have known the terms of the will of Mr. Hunt. I think the fair inference, upon the allegations of the complaint, is that that fact must have been known to them, and it will be observed that it is assumed in the condition of the bond that a portion of the money, at any rate, was not then payable by the surviving partners; and they therefore agreed that, whenever it should become payable, the surviving partners should pay it. Was not a portion of this account due within the terms of the will as was understood by the parties to which they agreed with the surviving partners? I think it was, and that the sureties agreed to that. We may assume that was the fact.

If the whole of the notes which were given on the eighteenth of July, 1876, are not due, some of them certainly are, and the sureties are liable for a portion at least of the amount. It certainly does not exempt the defendants from all liability, according to the terms of this paragraph, on the last note of \$20,000. So that, it being the duty of the court, while it protects the rights of sureties, at the same time to protect the rights of those for whose benefit the obligations of the sureties are given, I hold that it cannot be said that they are released from all liability.

And perhaps I ought to say, while overruling the demurrer, that it may be quite possible, if the case should go to trial before a jury, some facts may be elicited upon which it may be the duty of the court to say to the jury, or, if it should be left to the court, for the court itself to say, that the parties are released. But upon the face of the complaint I cannot say that this is so; and the demurrer, therefore, will be overruled. It may be overruled with leave for them to answer, or I will give them the benefit of an exception if they prefer that.

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RIDENBAUGH v. BURNES.

(Circuit Court, W. D. Missouri, W. D. 1882.)

1. ORDER OF PROBATE COURT—CONCLUSIVENESS OF.

An order of a probate court approving the final report of an administrator and discharging him from his trust, may be attacked and set aside in a court of equity upon satisfactory proof that the administrator has failed, either by mistake or fraud, to account for money collected by him, or for property which came into his hands by virtue of his office.

2. EQUITY PRACTICE—REFERENCE—ACCOUNTING.

Where the proof fails to furnish a proper basis for an accounting, but enough appears to make it desirable that the real facts be made to appear, the court may, in its discretion, refer the case to a master, with power to take further testimony and report thereon as to both law and fact.

Bill in chancery brought to set aside a settlement made by the defendant as administrator of the estate of George Young, deceased. The defendant was appointed as such administrator, November 24, 1874, and thereupon took charge of the assets of the estate, consisting largely of notes and accounts. On the fifth of December, 1874, defendant was ordered by the probate court of Buchanan county, Missouri, under whose orders he was acting, to loan the money belonging to the estate at the highest rate of interest he could obtain.

He made numerous loans, and collected in the aggregate a large sum of money as interest, with which he charged himself, but the complainant insists that he collected other sums as interest, with which he did not charge himself and for which he has never accounted. He also collected and accounted for certain rents, but the complainant insists that he did not account for all the rents collected by him. The defendant claimed and was allowed a credit in his settlement with the probate court on account of certain notes against insolvent parties, and complainant insists that these credits were wrongful and should not be allowed, because the notes were taken by defendant for loans of the funds of the estate, made to said insolvent parties when they were notoriously insolvent, and that the fact could have been ascertained by defendant by the use of ordinary diligence. Defendant acted as administrator from November 24, 1874, to January 16, 1880, when he made his final settlement with the probate court and was discharged.

*M. R. Singleton, Doniphan & Reed, and J. E. Merryman, for complainant.*

*L. H. Waters and Boggess, Cravens & Moore, for defendant.*

McCARY, C. J. It is insisted by counsel for defendant that complainant is estopped by the order of the probate court approving the final report of the defendant as administrator, and discharging him from his trust. It is true, as a general proposition, that final settlements by administrators with the probate courts are to be regarded as judgments; but I am unwilling to place them on the same footing with judgments rendered in causes litigated, and where all the parties in interest are present in court to assert and maintain their rights. An administrator acts in a fiduciary capacity. He is a trustee for the heirs and creditors of the estate, who are often infants or persons otherwise disabled to protect their rights. Such settlements are generally *ex parte*, and there is, even where, as in the present case, counsel are called in to examine the accounts, very little opportunity to ascertain any facts not communicated by the administrator, or apparent upon the face of the papers and records of the court. Such a settlement, in my opinion, may be attacked and set aside in a court of equity, upon satisfactory proof that the administrator has failed, either by mistake or fraud, to account for money collected by him, or for property which came into his hands by virtue of his office. The heirs cannot be bound by a settlement in which the administrator does not account for all the assets. A failure to so account is indeed a fraud, either in fact or in law, and vitiates the settlement. *Pratt v.*

*Northam*, 5 Mason, 103; *Clyce v. Anderson*, 49 Mo. 41; *Byerly v. Donlin*, 72 Mo. 271.

As the bill plainly charges that defendant did not account for all the interest and rents collected by him, it is the duty of the court to look into the proofs upon the subject, and to set aside the settlement and reward the complainant relief if her allegations are supported by sufficient evidence. With respect to the interest, the proof fails to show what loans were made by defendant, the amounts loaned, and the time for which made, and the rate of interest; and of course it does not show the aggregate amount of interest collected by him. Complainant relies upon the admissions in the answer that defendant "kept the money of the estate that came to his hands actively at interest for the use and benefit of the estate," and that he at no time "had any considerable amount of money of the estate that was not at interest." It is insisted that, in view of these admissions in the answer, it is the duty of the court to charge defendant with interest upon the aggregate amount of available assets in his hands as per the inventory. But the admissions relied upon must be considered in connection with the other allegations of the answer. They cannot be taken out of their proper connection and read by themselves. If complainant seeks to charge defendant upon the admission contained in the answer, it is the right of the defendant to have the whole of that pleading considered, and when so considered it is impossible to hold that it gives us any basis upon which to determine whether any, and if any, what, sum has been collected by defendant as interest, and remains unaccounted for. It is alleged in the answer that the estate was indebted in large sums, for which judgments were recovered, which defendant was compelled to pay. It is also alleged that frequent demands for money were made by complainant, and that large sums were paid out by him for taxes. Besides these allegations, the answer, which is very long, specifically denies each and every allegation of the bill which charges fraud or misappropriation of the funds of the estate, or a failure to account. It needs no argument to show that the answer does not contain admissions upon which there can be an accounting as to interest.

The proof is equally defective with regard to the rents. The complainant shows that there passed into the hands of the administrator certain real estate which was at one time rented at certain prices. If the defendant collected rent upon this property during the whole period of his administration at the prices at which it was rented during part of that period, then it is said, and I think correctly, that he

has not accounted for all that he received. But the court cannot assume, in the absence of proof, that the property was rented during the whole of that period at the same or at any other price, nor can we assume that all the rent that accrued was collected. It is thus seen that the proof fails to furnish a proper basis for an accounting, and that it would be impossible from the proof submitted to ascertain and state any definite sum as the sum recovered by defendant and not accounted for. Under these circumstances the court may either dismiss the bill, so far as these items are concerned, or refer the case to a master with power to take further testimony and report. In the exercise of this discretion I am disposed to adopt the latter course. If the complainant is unable to make further or better proof, it is her misfortune, as the burden is upon her to overcome by proof the strong presumption which the law raises in favor of the correctness of the final settlement with the probate court. The proof as it now stands leaves the essential facts relied upon by complainant unproved; but enough appears to make it desirable that the real facts be made to appear, if that is practicable. I am the more inclined to adopt this course because the defendant has not seen fit to testify in the case. It is true that he was not bound to do so until complainant had made at least a *prima facie* showing, but it is impossible to overlook the fact that it would have been easy for him to have made his defense perfectly satisfactory, if there is no truth in the complainant's allegations, by going upon the stand and testifying to facts which must be within his knowledge.

As the case must go to a master, the court will reserve its ruling upon the question raised concerning the worthless paper for which defendant has credit in his accounts, and that matter, with the others, may be considered and reported upon by the master.

#### ORDER.

It is ordered that this cause be referred to a master, with instructions to consider the proofs on file, and such other evidence as may be taken under this order, and report thereon as follows:

(1) Whether defendant, as administrator of the estate of George Young, deceased, received any sum or sums as interest which he did not report to the probate court and account for; and if so, what is the amount of the same? (2) Whether defendant, as such administrator, received any sum or sums as rent which he did not report to the probate court and account for; and if so, what is the amount of the same? (3) Whether defendant should be credited for notes of Hens-

ley, Skelton & Co. and G. R. Hines, either or both, and report his conclusions as to both law and fact.

With respect to the first and second of said matters of reference the master may, upon the application of either party, take further proofs at such times and places as he may determine.

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**RADFORD, Assignee, etc., v. FOLSOM and others.\***

(Circuit Court, S. D. Iowa, W. D. November 2, 1882.)

**1. PLEADING—ACTION PENDING IN STATE COURT—FOREIGN JURISDICTION.**

As the jurisdiction of a United States court cannot properly be considered as foreign in relation to the jurisdiction of a state court within the same territorial limits, an action pending in a state court may be pleaded in abatement of a subsequent action commenced between the same parties in the United States court for the district embraced by such state, for the same subject-matter and the same relief.

**2. SAME—FORMER ACTION—PENDENCY OF ACTION IN OTHER STATE.**

While an action pending in the courts of one state cannot be pleaded in abatement of an action commenced in the court of another state, even if there be identity of parties, of subject-matter, and of relief sought, the two jurisdictions being *foreign* to each other, the pendency of a former suit at law or in equity between the same parties, for the same cause and the same relief, in a court of the state in which the second suit has been brought, will be cause of abatement if pleaded in the second suit.

This cause is now before the court upon a plea to the bill interposed by the respondents, which is termed a plea in bar, but which, in effect, is a plea in abatement. The present bill is filed by George W. Radford, assignee in bankruptcy of Frank Folsom, against Jeremiah Folsom in his own right, Jeremiah Folsom, administrator of the estate of Sarah M. Folsom, deceased, and Adele, Florence, and George B. Folsom, minor heirs of said Sarah M. Folsom, who appear by J. B. Blake, their guardian; and in substance the bill avers that complainant is the owner of certain realty in the bill described, and prays that his title thereto may be confirmed and quieted as against the respondents, and that he may have a writ of possession. The plea sets forth that prior to the commencement of this proceeding, to-wit, in the year 1873, Frank Folsom, to whose rights his assignee, George W. Radford, was afterwards substituted, brought an action against

\*See 3 FED. REP. 199.

Jeremiah Folsom and Sarah M. Folsom, in the circuit court of Pottawattamie county, Iowa, "for the same matters and to the same effect, and for the like relief and purpose as the now complainant doth by his present bill set forth; in which said action issue was joined, and the same is still depending in said honorable court, and is undisposed of." To this plea the complainant interposes a demurrer, thus presenting the question whether an action pending in the state court of Iowa can be pleaded in abatement of a subsequent action commenced between the same parties in the United States court for the district of Iowa, for the same subject-matter and the same relief.

*Sapp & Lyman*, for complainant.

*Mayne & Reid* and *H. H. Trimble*, for defendants.

SHIRAS, D. J. The doctrine is now well settled that an action pending in a foreign jurisdiction cannot be pleaded in abatement of an action commenced in a domestic forum, even if there be identity of parties, of subject-matter, and of relief sought. *Smith v. Lathrop*, 44 Pa. St. 326; *Bowne v. Joy*, 9 Johns. 221; *Allen v. Watt*, 69 Ill. 655; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Stanton v. Embrey*, 93 U. S. 548. It is equally well settled that at law the pendency of a former action between the same parties, for the same cause and relief, in a court of the state in which the second action has been brought, will be cause of abatement if pleaded in the second action. *Insurance Co. v. Brune's Assignee*, 96 U. S. 588. In equity, the general rule is the same. Story, Eq. Pl. §§ 736-741. In *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, it is held that "the rule in equity is analogous to the rule at law," and the statements of Lord Hardwicke in *Foster v. Vassall*, 3 Atk. 587, is quoted approvingly, to-wit, that "the general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion."

The case of *Insurance Co. v. Brune's Assignee* further states the rule to be that "a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement;" and further, "it has no effect when pleaded to another bill in equity;" that is to say, a bill pending in a foreign forum will not, if pleaded, abate a bill pending in a domestic forum.

The reasons usually assigned in support of this doctrine are that the court of the one state or country cannot judicially know whether the rights of the plaintiff are fully recognized or protected in such

foreign state or country, nor whether the plaintiff can enforce to full satisfaction any judgment he may obtain in the foreign tribunal; and further, that a court will not compel a plaintiff to seek his remedy in a foreign forum; or, as it is said by the supreme court of Connecticut in *Hatch v. Spofford*, 22 Conn. 485: "That country is undutiful and unfaithful to its citizens which sends them out of its jurisdiction to seek justice elsewhere." None of these cases, however, meet the exact point presented by the plea interposed in the case now under consideration; for in all of them it will be found that the proceedings were pending in the courts of different states or circuits, whereas in this case the two proceedings are pending within the same state, but the one in the state and the other in the federal court. We do not find that this question has ever been finally settled by the supreme court of the United States, nor by the circuit court for this circuit.

In the case of *Brooks v. Mills Co.* 4 Dill. 524, is found a full and able discussion of the question in the opinion of Judge LOVE, both upon principle and authority, with a review of the decision of Mr. Justice CLIFFORD in *Loring v. Marsh*, 2 Cliff. 322; and the evils resulting from permitting parties to litigate the same subject-matter in two courts exercising judicial power within the same territorial limits, are very clearly and forcibly shown; and the conclusion is reached that "it would seem most rational and just that a plea in abatement should be allowed in order to avert consequences so mischievous." The judgment of the court, however, in that cause was placed upon another ground; the plea in abatement being overruled for the reason that it appeared upon the face of the plea that the parties to the suit in the state court were not the same as the parties to the bill in the United States court, and the question now before the court, though discussed, was not authoritatively determined. To the report of this cause in 4 Dill. is attached a full note by the learned reporter, citing the leading cases on the general question; and it is therein stated that "it is clear that the foregoing cases do not go to the length of holding that the pendency of a prior suit in a state court is not a valid plea in abatement to a suit for the same cause, and between the same parties to an action, in a United States court sitting in the same state;" and the reporter further states that Mr. Justice MILLER, in a case in the Minnesota circuit, "intimated his inclination to the opinion that where the parties are identical, and the scope of the subject-matter equally so, the pendency of a prior suit in the state court, within the territorial limits of the district where the second suit is brought in



the federal court, may be properly pleaded in abatement, or, at all events, will operate to suspend the action in the latter;" but, as we understand the statement of the reporter, this was not decided or ruled in the cause, so that, as already stated, the question remains an open one. As authorities bearing upon the question more or less directly, see *Earl v. Raymond*, 4 McLean, 233; *U. S. v. Dewey*, 6 Biss. 502; *Lawrence v. Remington*, Id. 44; *Smith v. Atlantic F. Ins. Co.* 22 N. H. 21.

In this condition of the authorities, what is the conclusion that should be reached from a consideration of the reasons upon which is based the doctrine that under certain circumstances the pendency of a prior action may be pleaded in abatement of an action commenced in the courts of the same state? The reason for the rule that the pendency of a former action may be pleaded in abatement of a second action, is, that if the complaining party has already an action pending in which he can obtain full relief, there is no justification for harassing the defendant by a second action for the same subject-matter. If it should appear, however, that in the second action the plaintiff can avail himself of some legal or equitable advantage, not open to him in the first action, then a legal reason is shown for the bringing of the second action, and the pendency of the one would not ordinarily abate the other. This is the reason why, as a rule, the pendency of an action at law cannot be successfully pleaded in abatement of a suit in equity.

As is said in Story, Eq. Pl. § 742: "It can scarcely ever occur that the remedial justice and the grounds of relief are precisely the same in each court, for if the remedy be complete at law, that is an objection to the jurisdiction of a court of equity."

In the well-considered opinion of the supreme court of Connecticut in *Hatch v. Spofford*, *supra*, it is stated in substance, that while the pendency of a prior suit of the same character, between the same parties, brought to obtain the same end, is at the common law good cause of abatement, yet the rule is not one of unbending rigor nor of universal application, nor a principle of absolute law, but rather a rule of justice and equity, and that a second suit is not, as a matter of course, to be abated as vexatious, but all the attending circumstances are to be carefully considered, and the true inquiry is, what is the aim and purpose of the plaintiff in the institution of the second action,—is it fair and just, or is it oppressive?

If it appears that the former proceeding, whether at law or in equity, is pending in a foreign state or country, and in this respect

the states of the Union are foreign to each other, this fact in itself determines the question adversely to the plea in abatement.

If it appears that the two actions are pending within the same state, and are both at law or both in equity, and are identical in parties, subject-matter, and relief sought, then no necessity appears for the institution of the second proceeding, in which event it would clearly be oppressive upon the defendant, subjecting him to unnecessary costs, and in such case the pendency of the first should abate the second proceeding.

On the other hand, if the two proceedings are pending in the same state, between the same parties, and concerning the same subject-matter, yet the relief sought is different, as in cases of an action at law and suit in equity, when the pendency of the one should not ordinarily operate to abate the other; for the difference in the relief obtainable in the two jurisdictions constitutes a sufficient legal reason for the maintenance of both proceedings.

But it is urged that while the second of the rules as above given may be applicable to cases pending in courts of the same state, yet it is inapplicable when one case is pending in the state and the other in the federal courts for the same state, the argument being that the two jurisdictions are foreign to each other, and hence that the pendency of a suit in the one court cannot be pleaded in abatement of a suit in the other. It is true that the state and federal tribunals owe their origin to different sources, but when created and brought into action within the same territorial limits, can it be fairly said that there are two states or jurisdictions co-existing within the same limits, and yet foreign to each other, in the sense that Iowa is foreign to New York? The same statutory and common law is enforced by both tribunals, and it cannot be said that if a party is relegated to the state court for the enforcement of his rights, that he is thereby sent into a foreign state or country, whose laws and modes of proceeding are unknown or unfamiliar.

As we have already shown, the main purpose of the rule allowing the pendency of one action to be pleaded, under given circumstances, in abatement of a second, is to prevent a defendant from being unnecessarily harassed, and subjected to additional costs by two proceedings when one will fully protect all the rights of the plaintiff. Now, it is apparent that the cost and vexation caused to the defendant by the institution of the second suit is, to say the least, not lessened by the fact that it is brought in the federal while the first is pending in the state tribunal. The evil to be remedied is not obviated by the

fact that the two proceedings are pending in tribunals owing their origin, the one to the state, the other to the federal government, yet acting within the same territorial limits.

If it appears that the two proceedings, being between the same parties, and for the enforcement or protection of the same rights, will result in the granting of the same remedy, operative within the same territorial limits, then it would seem clear that the second is not needed to protect or enforce the plaintiff's rights, and as the defendant must of necessity be put to additional trouble and expense in defending the second action, it follows that he is thereby vexatiously harassed, and in such case he should be enabled to protect himself by causing the abatement of the second action. It is the duty alike of the state and the United States court to protect a defendant from unnecessary and vexatious litigation. If the first action is brought in the state and the second in the federal tribunal, or *vice versa*, it is the bringing of the second action that constitutes the oppressive and unnecessary act on part of plaintiff, and the corrective should be applied in the court whose jurisdiction is invoked oppressively and wrongfully. Again, the fact that the one action is pending in the state and the second in the federal court, instead of being a reason why the second should not be abated, is, on the contrary, a weighty argument for just the opposite conclusion; for if the two proceedings are allowed to proceed at the same time, there may arise all the difficulties from a conflict between the two jurisdictions, acting within the same state, which are so fully presented in the opinion in the case of *Brooks v. Mills Co.*, already cited.

Applying these principles to the case before the court, it follows that the demurrer to the plea must be overruled, for the demurrer admits the allegation of the plea that the former suit pending in the state court is for the same subject-matter, and to the same effect, and for the like relief and purpose, that is contemplated in the second proceeding; and if that be true, then in the absence of any showing justifying the institution of the second suit, as being needed for the full protection of complainant's rights, it would necessarily follow that the second suit was uncalled for, and therefore vexatious.

In the argument of the demurrer, it was urged that the second suit was necessary for the enforcement of plaintiff's rights, for the reason that the supreme court of the state had decided in the first proceeding that the suit was prematurely brought, and hence should be dismissed. The effect of such fact cannot be considered on the demurrer, as it is not presented by the record, and the complainant,

if he desires to urge the same as a reason justifying the bringing of the second suit, must bring the same to the knowledge of the court in the further progress of the cause.

MCCRARY, C. J., and LOVE, D. J., concur.

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TATUM v. TOWN OF TAMAROA.

(Circuit Court, S. D. Illinois. July, 1880.)

1. STATUTORY CONSTRUCTION.

The granting in a statute of privileges and powers recited in a prior statute does not include the privileges and powers recited in a statute amendatory to the prior statute.

2. MUNICIPAL CORPORATIONS—INCORPORATION ACTS.

Where a statute incorporating a town declares that such town shall have all the rights, privileges, and powers conferred upon a town previously incorporated, the later incorporation act does not include the power conferred on the prior incorporated town by an act amending its act of incorporation, although the amendatory act has passed prior to the later incorporation act.

3. PROVISIO IN STATUTE.

A proviso in a statute which limits the authority of a town, and which limit is inconsistent with a power previously given, controls the general terms of the statute.

Suit upon Municipal Bonds.

*H. Tompkins*, for plaintiff.

*Henry Clay*, for defendant.

DRUMMOND, C. J. If there was authority to issue the bonds in this case and incur this indebtedness at all, it must have been by virtue of the act of 1859 incorporating the town of Tamaroa. That act declared that the inhabitants of that town were a corporation, with "all the rights, privileges, and powers conferred upon the town of Havana, in the county of Mason, approved February 12, 1853," and that all the provisions of the act aforesaid were applicable to the said town of Tamaroa. The words "by the act" seem to be left out. No doubt, however, this language refers to the act of February 12, 1853. There is a proviso that the trustees of the town of Tamaroa shall not levy more than one-half of 1 per cent. tax upon the real estate within the limits of said corporation. This act clothed the corporation of Tamaroa with all the privileges and powers conferred by the act of 1853, on the town of Havana, while the act of 1853 confessedly did not confer upon the town of Havana the right to issue bonds for

the construction of a railroad, and so by the terms of the act of 1859 no power was given to the town of Tamaroa to issue bonds for such a purpose. An amendment, however, to the act of 1853, incorporating the town of Havana, passed in 1857, did authorize the town of Havana to subscribe stock to any railroad that might be located in or through, or terminate at, that town; and the question is whether a fair construction of the act of 1859 is that the legislature intended to give to the town of Tamaroa, as it had given to the town of Havana, the right to subscribe stock for the construction of a railroad through, or terminating in, the town.

If so, it is by construction only, because the act incorporating the town of Tamaroa refers specifically to the act of 1853, and we would be compelled to assume by inference that it was the intention of the legislature to incorporate into the law of 1859, the amendment to the law of 1853, so as to clothe the corporation of Tamaroa with the same powers that were conferred by the amendment to the act incorporating the town of Havana. But considering the special reference to the act of 1853, and also the limit as to the power of taxation contained in the act of 1859, in respect to the property in the town of Tamaroa, we do not think that is a fair construction of the law.

It could hardly be said to be in the contemplation of the legislature when it passed the act of 1859, and clothed the corporation of Tamaroa with power, by reference to another act, specifying the date when that act was passed, that it included within it all the powers conferred by an amendment to that act, one of which was that of subscribing to the stock of a railroad, and thereby authorizing the town authorities to impose the necessary taxes to pay for the debt incurred by such a subscription, in the face of the proviso referred to limiting the power of taxation upon property within the town.

We are referred to a case of *Humphrey v. Pegues*, 16 Wall. 224, in which it is said the supreme court made such a ruling that by relation and by inference there must be included in the act of incorporation of Tamaroa in this case the amendment to the act referred to, incorporating the town of Havana. But in that case the court held that the amendment was incorporated in the subsequent act, because the act referred to "the charter" of the company in this language: "All the powers, rights, and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw & Darlington Railroad Company, and subject to the conditions therein contained;" and inasmuch as there had been an original act by which there were certain privileges granted to the company, and

an amendment made by which those privileges were increased, it was to be considered altogether as the charter of the company, and by a reference to the word "charter" the whole charter of the company was to be considered together, whereby the amendment became an integral part of the original charter, so that by reference to the charter in that way the subsequent law incorporated the amendment as well as the original act. Suppose, however, the language of the law in that case had been to confer all the rights and privileges of a charter referred to by the date as part of the description: then it might be said it was somewhat similar to the case now before the court; but such was not the language there. If, for instance, this law incorporating the town of Tamaroa had declared that it was to have all the privileges and rights which the town of Havana had, without referring to a particular act, then it might be presumed that it referred to existing laws in force at the time that the corporate power was thus given to the town of Tamaroa. But, inasmuch as the act of incorporation in this case refers to a particular statute, we think it is scarcely inferable that it was in the mind of the legislature to give to the town of Tamaroa the right to subscribe to the capital stock of a railroad, and thereby impose additional burdens on the inhabitants of the town, especially when the very language of the act of 1859 limits the power of the town authorities to tax property within the town to not more than one-half of 1 per cent. Can it be fairly inferred, with such a limit upon the authority of the trustees, that the legislature intended to say that the town of Tamaroa should have the power to subscribe to the stock of a railroad, and thereby impose a tax on the people of the town, in the face of the express proviso to the act of 1859 defining the powers of the corporation? We think not. Therefore, if it were true that by a strained inference there was such an intention shown in the body of the act, still, there being a proviso of a limit upon the authorities of the town, which limit would be entirely inconsistent with a power previously given, the limit would control; the proviso would operate upon all previous language in the act. And so, without going further into this question, we hold that the plaintiff cannot recover.

## NORTON and others v. CITY OF DOVER.

*(Circuit Court, D. New Hampshire. October 31, 1882.)*

## PRACTICE—AMENDMENT OF WRITS—TERMS.

While the practice in the state courts may enlarge the power of amendment in the federal courts, it cannot diminish such powers as are conferred by acts of congress.

*Caverly, Kevil & Wooleigh and Mr. Fish*, for plaintiffs.

*Mr. Mugridge, G. L. Roberts & Brother, and Mr. McLane*, (specially,) for defendant.

LOWELL, C. J. The writs in this and several other cases were made returnable on the eighth of October, 1882, which was Sunday, and by Rev. St. § 658, the term of the court began on Monday, the 9th. There can be no doubt that the writs were voidable and might be quashed on motion. Three unreported cases in this court, decided in 1876, are cited which establish that point. I am informed that in none of these cases the question argued here, whether such process can be amended, was passed upon by the court. In these cases the printed briefs contain a petition for leave to amend, as well as an argument upon the subject. Such a writ was held to be void and not amendable in *Wood v. Hill*, 5 N. H. 229, which was followed; *Bell v. Austin*, 13 Pick. 90; and that in *Brainard v. Mitchell*, 5 R. I. 111. The first of these decisions was explained in *Kelly v. Gilman*, 29 N. H. 385, as belonging to an exceptional class of cases in which the process was by assent of the person, and the general rule was said to be that a mistake in the return-day may be amended. In cases cited from Massachusetts and Rhode Island the defendants did not appear. If he does appear, though only to move to quash, the law of Massachusetts now is that the writ may be amended. *Hamilton v. Ingraham*, 121 Mass. 562; *McIniffe v. Wheelock*, 1 Gray, 600; *Fay v. Hayden*, 7 Gray, 41. I have found no law in New Hampshire precisely like this, but in my opinion the defect is amendable by the law of this state. See Gen. Laws 1878, c. 226, §§ 8, 9; *Kelly v. Gilman*, 29 N. H. 384; *Tandy v. Rowell*, 54 N. H. 384. If the defendant had not appeared justice would require that notice should be served on him. With such service, I have but little doubt of the power of a court of New Hampshire to permit an amendment. But, however this may be, the practice in New Hampshire, while it might enlarge our powers of amendment, cannot diminish those which are conferred upon us by the acts of congress. By Rev. St.

§ 948, any circuit or district court may, at any time in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues.

I am of opinion that an amendment of these writs will not prejudice defendants, who had due notice to appear on Sunday, and who did appear, though under protest, on Monday. *Hampton v. Rouse*, 15 Wall. 684; *Semmes v. U. S.* 91 U. S. 21; *McIniffe v. Wheelock*, 1 Gray, 600. The question, it must be remembered, is not whether the common law would have called these writs void or voidable, (though if that were the question it might be well maintained that they were voidable only,) but whether the statute of the United States is broad enough to include them in the class of processes which may be amended. Of this there is no doubt. As the writs were voidable, I think they should be amended on the terms of the plaintiff, taxing no costs up to the time of the amendment. Amendment on terms within 30 days.

NOTE. The circuit court may allow an amendment of a writ of error made returnable on a wrong day. *Semmes v. U. S.* 91 U. S. 21; *Woolridge v. McKenna*, 8 FED. REP. 663. A summons which did not issue cannot be amended by adding a seal and the signature of the clerk. *Dwight v. Merritt*, 4 FED. REP. 614; *S. C.* 18 Blatchf. 306; *Peaslee v. Haberstro*, 15 Blatchf. 472.—[ED.]

### Duy, Receiver, etc., v. KNOWLTON.\*

(Circuit Court, D. Indiana. October 28, 1882.)

#### MARSHAL'S FEES.

Where the marshal is required to serve process in suits other than where the United States requires the service, he has a right to demand his fees in advance of the service to be performed.

*Claypool & Ketcham*, for plaintiff.

*Charles L. Holstein*, U. S. Atty., for the marshal.

GRESHAM, D. J. The usual process was issued in this case, directed to the marshal, commanding him to summon the defendant. The marshal refuses to serve the process until the proper fees are paid in advance or a deposit of money made for their security. A rule is

\*Reported by Chas. H. McCafer, Asst. U. S. Atty.



asked against the marshal to show cause why he should not be punished for contempt for his refusal to serve the process.

In settling his accounts with the proper accounting officers of the treasury department, the marshal is charged with all fees earned by him, and from the amount thus earned he is allowed to retain for his personal compensation, over and above the necessary expenses of his office, including clerk hire and the amount allowed his deputies, any sum remaining, not exceeding \$6,000. If any excess remains over and above the credits allowed by law, he is required to pay it into the treasury, whether the fees earned have been collected or not.

The marshal is therefore a public officer, charged with the duty of collecting funds for the United States, and when he is required to serve process (not in suits where the United States requires the service) he has a right to demand the payment of the proper fees in advance of the service performed. He need not wait and take the chances of collecting them on an execution. See Rev. St. 841 to 846, inclusive.

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### TURNBULL and others v. WEIR PLOW Co. and others.

(Circuit Court, N. D. Illinois. March, 1880.)

#### 1. PATENTS FOR INVENTIONS—CONVEYANCE OF RIGHT.

A conveyance of "all my right, title, and interest in and to" a patent, though properly recorded, does not include the right for two counties covered by a prior conveyance, although the prior conveyance was not recorded in the patent-office.

#### 2. CONVEYANCE OF PATENT—WHAT INCLUDES.

A conveyance of the right to make and sell a patent includes the right to the use of the thing patented.

In Equity.

*James L. High*, for complainants.

*West & Bond*, for defendants.

DRUMMOND, C. J. I think the plaintiffs in this case were entitled to a decree. Some of the questions involved are of importance, and have been reargued in this case.

The bill charges an infringement by the defendants of two claims in the patent, issued originally October 18, 1859, and reissued in 1871, for some improvements in a plow or cultivator. One of the principal, and the most important questions in the case arises under

the law of congress upon the subject of patents. The patent was issued originally to Thomas McQuiston, and the plaintiffs claim, through him, the right in two counties, Warren and Henderson, in this state, to use the improvement patented. The conveyance by McQuiston, through which the plaintiffs claim, was not recorded in the patent-office at the time the conveyance, through which the defendants claim, was made by McQuiston and recorded. In other words, the conveyance through which the defendants claim from the patentee was first recorded in the patent-office before that through which the plaintiffs claim was recorded.

I stated, at the time I decided this question before, (*Turnbull v. Weir Plow Co.* 6 Biss. 225,) that it was one of great difficulty, and about which I had some doubt, because the decision seemed to be contrary to the practice adopted in the patent-office as to the construction which was there placed upon assignments of patents. After the patentee had made an assignment of the right to these two counties in Illinois, he made an assignment through which the defendants claim, which assignment, it is insisted, according to the general scope of the language, would include the two counties which had been previously assigned by the patentee, and under which the plaintiffs claim. The language of the assignment to the defendants is as follows: "Do hereby grant and convey to the said William S. Weir all my right, title, and interest in and to said letters patent in the following-described territory." The construction which the court formerly placed upon that assignment was that it did not necessarily include the right which had been previously conveyed by the patentee in the counties of Warren and Henderson, but only included all the right which the assignor then had. The language of the statute authorizing assignments in writing to be made of rights secured by letters patent, is somewhat different from that contained in this assignment, and also in the form which was given by Mr. Fisher at the time he was commissioner of patents. The language in the statute in substance is this: all the right which was secured to the patentee by letters patent. Rev. St. § 4898. The language used in the form prescribed by Mr. Fisher is substantially like that used in the assignment through which the defendants claim: "all the right, title, and interest in and to said letters patent." It is quite clear to my mind that Mr. Fisher, at the time he prescribed this form, was not thinking of the case where a patentee had disposed of a portion of his interest in the letters patent,—as, for example, in such a case as this, where he had assigned the right in a particular terri-

tory, reserving his right to other portions of the territory covered by the patent,—and therefore I cannot hold that the form prescribed by Mr. Fisher has the same efficacy as that prescribed by the statute itself. Where a man assigns all the right which was conveyed to him by letters patent, the meaning is that the assignment takes with it everything that the letters patent conveyed. It is certainly different from an assignment which declares merely that he assigns all the interest which he, at the time he makes the assignment, has in the letters patent, provided, as in this case, he had previously assigned a part of the interest which he had to another person. So that, admitting that the question is one of difficulty and doubt, I must still adhere to the view which I originally took of this case, and hold that it was not the intention of the assignment which was made to Weir, and through which the defendants claim, to convey to him the interest, which had been previously conveyed by the patentee, in the counties of Warren and Henderson, in this state.

Another objection made to the right of the plaintiffs to recover is that the conveyance to them did not include the right to use as well as to make and sell the improvement patented within those counties. I think that the assignment to make and sell includes necessarily the right to use the thing patented, because without the right to use, the right to make and sell would be a barren right. It must be construed as having been the intention of the parties that the right to manufacture and sell, included the right in the vendee to use the thing sold.

There is nothing in the case to estop the plaintiffs from setting up a claim under this patent in consequence of any supposed laches that they may have committed; and I think it must be considered that the defendants, under all the circumstances in the case, have infringed upon the right of the plaintiffs. I have not the models of the machines here, without which a statement of the particular points constituting the claim of infringement by the defendants would be unintelligible. It is sufficient to say that I have heretofore fully considered those questions, and have reconsidered them on the argument which has been made, and have reached the conclusion which I then formed, although, perhaps, I did not particularly state it at the time.

It may be said the case is not one of very great importance in some respects; that is, it includes only two counties in this state; but, as I have said, some of the questions involved are quite important, and particularly as to the construction, under the patent law, of the assignments in this case.

**P. LORILLARD & Co. v. McALPIN and others.**

(*Circuit Court, S. D. New York.* February 28, 1882.)

**PATENTS FOR INVENTIONS—REISSUE.**

A claim in a reissue cannot be extended so as to embrace an invention not specified in the original.

*Gifford & Gifford*, for plaintiffs.

*B. F. Thurston and S. A. Duncan*, for defendants.

BLATCHFORD, C. J. In view of the decision in *James v. Campbell*, 3 Morr. Trans. 439, there is so much doubt as to the validity of the reissue ["Improvement in Plug Tobacco," granted to Charles Siedler, October 24, 1876,] in this case, if construed, in regard to claims 1, 3, and 4, as covering labels not put under wrappers, that those claims must be construed, for the purposes of this motion, as not extending to labels not under wrappers. That being so, the defendants do not infringe.

The motion is denied.

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**THE MARKEE.\***

(*Circuit Court, E. D. Pennsylvania.* October 27, 1882.)

**ADMIRALTY—OPINION OF DISTRICT COURT—3 FED. REP. 45, AFFIRMED.**

Appeal from a decree of the district court in a case fully reported in 3 FED. REP. 45.

McKENNAN, C. J. At the argument of this appeal I entertained some doubt as to the libelant's right to recover. Subsequent reflection has removed that doubt, and it is, therefore, now adjudged and decreed that the libelant recover from the respondent and his stipulator \$910.50, with interest from August 31, 1877, and costs, except the costs of depositions taken by libelant since the appeal.

See *Kenah v. The Tug John Markee, Jr.*, 3 FED. REP. 45.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

## HALL v. BROOKS.\*

(Circuit Court, E. D. New York. November 16, 1882.)

## 1. REMOVAL OF CAUSE—FAILURE TO FILE RECORD—EXCUSE.

Where, on a motion to remand a cause to the state court for failure to file the record in the circuit court before the first day of the next term, the defendant appeared and offered to file the record, and gave as excuse for not having done so that the information obtained at the clerk's office was understood to mean that the next term would be in December, when it actually began November 1st, *held*, that the excuse was sufficient, and the defendant must be allowed to file the record.

## 2. SAME—MOTIVE FOR REMOVAL IMMATERIAL.

The failure to file the record having caused no delay of the trial, and in no-wise prejudicing the plaintiff, the fact that the motive for removing the cause was to delay the trial is immaterial, and it is the duty of the circuit court to retain the cause, without regard to the motive which impelled the removal.

*Hathaway & Montgomery*, for plaintiff.

*Clark Brooks*, for defendant.

BENEDICT, D. J. This is a motion to remand the cause to the state court because of a failure to file the record in this court on the first day of the next term, which was November 1st. It is admitted that the record has not been filed. The defendant offers now to file it, and his excuse for the failure sooner to file it is that his attorney made inquiry at the clerk's office as to the time of holding the next term of the court, and understood the information there given him to import that the next term of the court would be in December, and therefore supposed that he had until December to file the record.

According to the law as settled by the supreme court of the United States, (*Baltimore & O. R. R. v. Koontz*, 13 Reporter, 228,) failure to file the record on the first day of the next term does not deprive the circuit court of jurisdiction over the cause, and when a sufficient cause for the failure so to file the record is shown, it is the duty of the circuit court to permit the record to be filed, and allow the cause to proceed in the circuit court.

The excuse here made for the failure to file the record at the November term is sufficient, and the defendant must therefore be allowed to file the record at this time. The fact, if it be a fact, that the motive for removing the cause to this court was to delay the trial, is immaterial. The failure to file the record on the first day of the

\*Reported by R. D. & W. J. Wyllys Benedict.

November term caused no delay of the trial, and in nowise prejudiced the plaintiff. This being shown; and sufficient excuse for the omission given, it is the duty of this court to retain the cause, without regard to the motive which impelled the removal. Upon filing the record, an order may be entered denying the motion to remand.

See *Railroad Co. v. Koontz*, 104 U. S. 5.

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FARLEY v. ST. PAUL, M. & M. RY. Co. and others.\*

(Circuit Court, D. Minnesota. 1882.)

EQUITY WILL NOT AID A FRAUDULENT TRANSACTION OR BREACH OF TRUST.

A court of equity will not aid parties in the consummation or perpetration of a fraud, nor give any assistance whereby either of the parties connected with a betrayal of a trust can derive any advantage therefrom; nor will it unravel a tangled web of fraud for the benefit of any one enmeshed therein, through whose agency the web was woven. Especially must this be the rule where one of its own officers, whose position is both advisory and fiduciary, seeks its assistance to compel alleged confederates to share with him the spoils acquired through his own concealments and deceits in the betrayal of his trusts.

*Griffith & Knight, Gilman & Clough, and Davis, O'Brien & Wilson,* for complainants.

*R. B. Galusha, Geo. B. Young, and Bigelow, Flandrau & Squires* for defendants.

TREAT, D. J. This case is before the court on a joint plea and the evidence pertaining thereto. Counsel on either side have given the largest aid to the court by oral arguments, elaborate briefs, and full citations of authorities; and therefore, however interesting an exhaustive review might be if time permitted, the task is unnecessary. It must suffice to state that the supposed conflict of authority, when the cases are analyzed, disappears, so far at least as the rules of equity decisive of the questions now to be determined are involved. It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud, nor give any assistance whereby either of the parties connected with a betrayal of a trust can derive any advantage therefrom.

It is contended that this case does not fall within the general rule, because the fraudulent scheme ended with the purchase of the bonds, and the aid of the court is not invoked to enforce the same. It is clearly shown, however, that such purchase was merely the initiatory

\*Reversed. See 7 Sup. Ct. Rep. 534.

step towards effecting the main design. The theory of the bill, the plaintiff's own testimony, and all the facts and circumstances proved, demonstrate that plaintiff's scheme was to acquire the large railroad properties through the acquisition and use of the depreciated bonds. The plaintiff urges that he devised the plan, and that, without the assistance he alone could give, the plan would necessarily fail. He goes even further in disclosing that it was only through concealment of his connection with the operations could success be realized. He held an eminently fiduciary relation to all interested in the property committed to his management; and it was through information thus acquired and concealed from the beneficiaries, also from the state and United States courts, that the contemplated fraud could be effected.

It may be conceded that in private trusts, where constructive frauds have been consummated and the wronged parties do not complain, courts have refused to listen to volunteers, or, as between parties litigant, examine into the means whereby the one or the other has become charged with a new trust towards his associates. This rule rests largely on the reason that the court is called upon, not to ascertain the sources whence the fund was derived, in the absence of beneficiaries complaining, but merely to decide whether a new trust was created which has been or is about to be violated. It may be that there is discernible in adjudged cases a distinction between acts *mala prohibita* and *mala in se*, through which funds have come into the hand of one confederate for the benefit of all,—acts which have no intrinsic turpitude further than is implied in the violation of a mere statutory prohibition. The strongest case cited for plaintiff (*Brooks v. Martin*, 2 Wall. 70) contains that element, and seems to be shaded with the thought that the parties sought to be protected by the statute not only failed to complain, but most of them ratified expressly all that had been done. That case was peculiar in many of its features, and, like the English cases cited in the opinion, is clearly distinguishable from the transactions now under review. In those cases there was no act of moral turpitude, like the betrayal of trust for selfish greed, which called for investigation, but merely the relationship of the litigant parties, independent of prior dealings between them and others.

In *Brooks v. Martin* the court examined into the assignment obtained by Brooks from his partner, Martin, through actual fraud, and ruled that he could not shield himself from the consequences of that fraud by showing a prior violation of a prohibited act in which they

were participants, even if such a violation, consummated, furnished the trust fund assigned. To hold otherwise would have permitted a person to escape the consequences of one fraud by setting up another and distinct fraud in which the litigants had previously participated. To escape the result of a fraudulent assignment, Brooks urged on the court as a defense that said fraudulent assignment was connected with a joint fraud theretofore committed. Such a defense the court refused to consider.

There is another class of cases—the most pointed of all—the rigid enforcement of whose rules is essential to the pure administration of justice. Those rules not only forbid one charged with an official duty of a fiduciary nature from betraying his trust for private gain or any purpose whatever, and among other penalties subjects him to whatever loss may fall upon him through the dishonesty of his confederates. That statutory end is effected by a resolute refusal to give him any aid towards the enforcement against his confederates of their fraudulent scheme. Courts will not and ought not to be made the agencies whereby frauds are to be in any respect recognized or aided. They will not unravel a tangled web of fraud for the benefit of any one enmeshed therein through whose agency the web was woven. Especially must that be the rule where a trusted officer of a court, whose position is both advisory and fiduciary, seeks its assistance to compel alleged confederates to share with him the spoils acquired through his concealments and deceits, which he admits were deemed by his confederates and himself necessary to their success through his betrayal of his trusts.

The plaintiff conceived a scheme to wreck the vast interests which it was his duty to protect. He had acquired in his fiduciary capacity information through which the desired end could be reached. It was necessary for him to have confederates, that he should impart to them his secret information; that he should continue through the progress of the scheme to advise with and inform them of what, from time to time, became known to him; that his connection with them should be concealed from the courts, to whose orders he was subject, and which had a right to rely upon his fidelity. Through a betrayal of his trust under such circumstances, according to his version of the facts, these vast railroad properties have been secured, and a profit realized of possibly \$15,000,000 or more. His pretense now is that through such betrayals of official and *quasi* judicial trusts, his alleged confederates have amassed properties, moneys, and values to a vast amount, with an understanding from the beginning that they were



to reward him for his betrayals by sharing with him one-sixth or some other portion of the spoils. They deny his averments, and he charges that they repudiate the fraudulent contract they made with him. As they do not divide the spoils, this suit is brought to compel them and the railroad defendant, as if by specific performance, to issue to him his proportionate share of its capital stock, and also grant him proportionate parts of profits and gains and also interests in undivided property yet remaining.

This is a strange demand to present to a court of equity. To what extent the alleged confederates are blameworthy or culpable, if at all, could be made to appear only after answer and full proofs. The court, however, must dispose of the case as now presented. A few days ago a demurrer interposed was overruled, on the ground, substantially, that the theory of the bill was to require of the court the enforcement against the railroad defendant not only a division of the alleged corrupt spoils, a part of which had passed to the possession of the co-defendants, but of the remaining assets, undivided; also a partition of property, etc., as just stated. Thus the powers of a court of equity were invoked to enforce the execution of a fraud on itself as a court as well as upon others. Surely no principle of equity, morals, or law can countenance such a demand, and no court worthy of its trust would lend its aid to further a scheme so abhorrent to all recognized rules of right and justice.

It is charged, however, and for the purposes of this case may be admitted, that Mr. Kennedy, agent of the Amsterdam committee, was advised by plaintiff during the progress of the scheme that he, the plaintiff, was secretly betraying his trust. If so, the gravity of plaintiff's offense was not lessened by thus adding a new confederate to his fraudulent plans, especially one whose relations were eminently fiduciary towards his principal, the Amsterdam committee, the court, and others interested. Plaintiff's cause of action is based upon inherent turpitude, and hence the fundamental maxim applies, "*Ex turpi causa*," etc.; therefore, another maxim has potential force, viz.: "*Potior est conditio defendantis*." In plain English, courts of equity will not recognize as valid, or enforce, any agreement grounded in turpitude; nor will it undertake to unravel a tangled web of fraud for the purpose of enabling one of the fraudulent parties, after such judicial disentanglement, to consummate his fraudulent designs. The party complaining must come before the court with clean hands. In this case he has not, by the averments of his bill, nor by his sworn testimony, either clean hands, within the rules of equity, nor any cause

of action which can be upheld without a flagrant violation of the most positive and clearly-defined rules governing such cases.

The plea is sustained and the bill dismissed, with costs.

NELSON, D. J., concurred.

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WIEGAND v. COPELAND.

(Circuit Court, D. California. February 6, 1882.)

1. APPEAL—FINAL DECREE—DISSOLUTION OF PARTNERSHIP.

Whether a decree in a suit for a dissolution of partnership which determines the rights of the parties, and directs that the property be sold, and that certain sums be paid out to the various parties for costs, fees, and expenses, and that the remainder be divided *pro rata*, according to their respective interests, between the parties, but without providing for the debts of the partnership, is a final decree, *quære*.

2. PARTNERSHIP PROPERTY.

Real estate put into the partnership by one of the parties at an agreed valuation becomes partnership property without a conveyance from the owner, and such owner holds the legal title in trust for the partnership as assets of the partnership estate.

3. SAME—DIVISION ON DISSOLUTION.

Where real estate held by a partnership cannot be divided between the partners, or it is required to pay the partnership debts, the court, upon a decree of dissolution, may order the sale thereof, and the proceeds to be appropriated to the partnership debts, and the surplus to be divided between the partners.

4. ERRORS NOT REVIEWABLE.

Errors in orders and proceedings subsequent to rendition of the decree, from which no appeal can be taken, cannot be considered.

5. COSTS IN EQUITY.

In an equity suit costs are in the sound discretion of the court.

Appeal from the Consular Court of Yokohama.

E. D. Sawyer, for appellant.

George A. Nourse, for respondent.

SAWYER, C. J. From the record in this case it appears that prior to the fifteenth day of June, 1876, the plaintiff and the defendant were each engaged in business at Yokohama, in Japan, as brewers; and that on that day they entered into a copartnership to carry on the business of brewing. The defendant seems to have been the owner of a larger establishment than the plaintiff. It was agreed that the value of the defendant's land, brewery, and what is called his plant (by which, I suppose, is meant the implements and fixtures

used in carrying on the business of brewing, etc.) should be estimated and put into the business at \$30,000. They were to be equal partners; and Wiegand, being unable to contribute his share of that amount, became indebted to Copeland in the sum of \$15,000, being one-half the value of the property. Soon afterwards, or at about the same time, Wiegand contributed to the copartnership his plant and stock, valued at \$2,421.64. This the consul general holds—and I think properly, under the testimony—was an additional amount of capital. Copeland took one-half the stock and plant of Wiegand, and gave him credit for the amount—\$1,210.82—upon his indebtedness of \$15,000 for one-half of the capital, which left him still indebted to the amount of \$13,789.18.

Copeland did not transfer to Wiegand the legal title to one-half of the real estate of the copartnership; but, upon the formation of the copartnership, books were opened and the property entered at \$30,000 as capital, and each of the parties was credited with one-half of the amount—\$30,000—at which the real estate, plant, etc., had been agreed to be appraised.

The copartnership business was carried on for three years and a half, and the complainant then filed a bill for a dissolution of the partnership, alleging fraudulent acts and other irregularities on the part of Copeland. The case was tried before Consul General Van Buren, who found that Copeland had not been guilty of the acts charged, and he would have dismissed the bill, but, as the action had been instituted, it was agreed by the parties that a decree of dissolution of the copartnership should be entered, and the business of the firm wound up. A decree dissolving the copartnership was therefore entered, and the matter referred to an accountant to prepare a statement of the property and accounts of the firm. In his report the accountant finds that the net profits of the copartnership business have amounted to \$19,450; that under an arrangement that each partner was to draw \$150 a month, Copeland has drawn out a little more than that amount, and Wiegand something less; and that, upon striking a general balance, \$26,287 of the estimated value of the firm assets is found to be the share of Copeland, and \$6,250 that of Wiegand. Thereupon the court entered a decree adjudging these amounts to be the proportions belonging to the parties, respectively, and ordering that the partnership property, including the real estate, plant, etc., be sold at public auction, and the proceeds, after deducting certain sums for expenses, costs, and fees, divided *pro rata* between the parties.

Subsequently, further proceedings were had in the case, upon which additional provisions were made relative to the manner in which the property should be sold; and all the property of the partnership was, thereupon, sold, in pursuance of the decree and the further direction of the court. Upon the sale it proved that there were no bidders except Copeland; Wiegand being unable to purchase, and the property being apparently situated in a country where no other persons than the plaintiff and defendant were desirous of engaging in the brewing business. The property was bid in by and sold to the defendant, Copeland, for \$12,000,—an amount very much less than the value at which it had been estimated in the report of the accountant and in the decree of the court, where the value of the assets of the firm was set down at \$32,537. As a result, Wiegand not only had nothing coming to him, but he was brought in debt to the amount of several thousand dollars. A further decree was thereupon entered that he pay to Copeland the amount of such indebtedness, and this appeal has, consequently, been taken.

The first question raised by the appellee is that the appeal is not from a final decree. The decree of December 6, 1879, from which the appeal is in terms taken, being the first decree, determines the rights of the parties, and directs that the property be sold, and that certain sums be paid out to the various parties for costs, fees, and expenses, and the remainder divided *pro rata*, according to their respective interests, between the complainant and the defendant. It is insisted that this is not, under the law, a final decree, and that, therefore, an appeal from it does not lie.

It is not entirely clear to my mind whether or not this is a final decree, within the meaning of the law. It determined certain rights of the parties, and fixed the proportionate amounts due to each upon the assumed valuation of the property of the copartnership. It provided for the payment of certain sums of money to various parties, but without ascertaining the amounts, and the partnership debts. The debts of the firm had not been ascertained by the decree, and the amounts to be paid as costs were not determined. There were subsequently further proceedings, and further provisions made having the effect of additional provisions to the decree, by which the mode of sale of the property was prescribed; and still later, after the affairs of the copartnership were settled, the debts, expenses, fees, and costs ascertained, and paid out of the proceeds of the sale, there was entered another further, separate, and final decree, directing that Wiegand pay to Copeland a certain amount, being the balance finally found

due him. It is therefore a matter of some doubt whether or not the decree appealed from is properly a final and appealable decree. But the conclusion to which I have come on the merits of the case makes it unnecessary to definitely determine that question, as the result as to this appeal would in any event be the same.

Assuming, then, for the purpose of this case, the appeal to have been properly taken, the first point made by Wiegand is that the property referred to ought not to have been regarded as partnership property, because the legal title to one-half of it had not been absolutely conveyed to him by Copeland. Under the terms of the copartnership agreement it was manifestly partnership property, its value being therein fixed at \$30,000; and, upon the commencement of the business of the firm, one-half of that amount was charged to each party upon the firm books, and no question as to its not being partnership property was raised during the three and a half years in which the business was being amicably conducted. Besides, Copeland gave Wiegand an acknowledgment in writing that one-half of that property was held in trust for him, and a mortgage was given by Wiegand upon his half of the partnership property to secure to Copeland the payment of the \$15,000 due him on account of his half interest in this property. Wiegand claimed one-half of the profits of the copartnership business, and if he was entitled to a full share of the profits, he was, certainly, liable for an equal share of the losses from depreciation in value of the firm assets, or otherwise. I do not understand that at the time the decree appealed from was entered, directing that the property be sold, any objection was made upon the part of Wiegand that the shares of the respective parties were not properly ascertained. In the nature of the case it was a species of property which could not be divided; and, in order that it should be distributed to the parties in the proportions to which they were entitled, it was necessary that it should be converted into money. Under the circumstances, the proper and only mode of settling the affairs of the copartnership was a sale and division of the proceeds. I think, therefore, that the court is not in error in holding this to be partnership property, and ordering that it be sold. If the legal title was in Copeland, he still held it in trust for the firm as partnership property.

If, upon the sale, the property had brought the amount at which its value had been estimated, it is highly probable that no question would have been raised as to the correctness of the decree, or the action of the court in this particular. Each of the parties would have

received the amount to which he was entitled, and Wiegand would have been content with the sum that he had claimed and received. If any hardship has resulted to Wiegand from the result of the sale, it has accrued from proceedings subsequent to the decree from which the appeal is taken, not a necessary result from the matters decreed, and it is not open to consideration on this appeal. If the property had brought upon the sale a larger amount than its estimated value, there would have been quite a large sum coming to Wiegand; or, even if it had been sold for its estimated value, the result would undoubtedly have been entirely satisfactory to him. The difficulty, then, does not arise from the decree, but from the failure to realize from the property the value which had been put upon it. If there was a depreciation in the value of the property, Wiegand must bear his share of the resulting loss. If there was any fraud or error in the subsequent proceedings, including the direction of the mode of sale, it is not open to review now, because there is no appeal from the subsequent final decree.

Another objection of Wiegand is in reference to the costs; it is contended that he should not be required to pay certain costs. In an equity suit of this character, the costs are in the sound discretion of the court, and its decision in that regard is not subject to review. Even if that were not so, I do not think the court unduly exercised its discretion in its decision as to the costs.

The fact is, as found by the consul general, that Wiegand had no valid ground of complaint. If he had gone on with the business, and had not applied for a dissolution of the copartnership, the probability is that he would have received his share of the profits, paid his indebtedness to his partner, and been placed upon an equal footing with him in a prosperous business. But, unfortunately for him, he sought a dissolution; and Copeland, after at first successfully resisting his application on the grounds alleged, finally consented to it. The court then by its decree directed that the property be sold and the proceeds divided. It was unfortunate for Wiegand that, upon the sale, he was unable himself to bid upon the property, and that at that time and place there was no competition; but any hardship or wrong, if any there is, growing out of these circumstances, was subsequent to the decree from which this appeal is taken, and is not open for discussion on this appeal.

I think the decree appealed from is correct, and it must be affirmed; and it is so ordered.

## TOWN OF MOUNT ZION and others v. GILLMAN.

*(Circuit Court, S. D. Illinois. July, 1880.)*

## 1. EQUITY—PREVENTING MULTIPLICITY OF SUITS.

A bill in equity will lie to prevent a multiplicity of suits, but where repeated suits have already been brought, and judgments have been rendered therein, a bill in equity will not lie.

## 2. INJUNCTION—SUIT BY TAX-PAYERS.

Whether the tax-payers of a town can bring suit to enjoin a judgment obtained against a town on coupons issued by it, *quære*.

## In Equity.

*Anthony Thornton*, for complainants.

*Hay, Greene & Littler*, for defendant.

DRUMMOND, C. J. In this case a question comes up somewhat irregularly, but we will take the allegations of the bill and of the answer, and, on the assumption that the facts are properly stated in the pleadings, dispose of the case.

The facts, then, are that the defendant in this case was the owner of \$15,000 in bonds, some coupons of which had fallen due and were unpaid, and a suit was brought against the town. The suit was contested, and after consideration of the various questions raised in the defense this court rendered a judgment in favor of the plaintiff. Afterwards, four other suits were brought against the town on coupons that fell due, and judgments rendered. These last judgments were rendered by default.

The pleadings state that one of the judgments was paid and the others were in full force. After all this had taken place this bill was filed by the town, and some of the tax-payers of the town, for the purpose of enjoining a judgment obtained in this court, and for quieting the title, as it is called, of the tax-payers to their property, because these bonds were claimed as a debt against the town, and the property was liable to be taxed for the payment of the bonds and coupons. So we have to assume that after a controversy against the town, in which judgments were rendered, and after payment of at least one judgment, tax-payers filed a bill for the purpose of restraining the defendant from prosecuting suit on the bonds or coupons on the ground that they were illegal. The prayer of the bill is that as the plaintiffs are without adequate remedy at law, the further prosecution of the suit at law, as well as any others, should be restrained, and the main ground of equity alleged is on account of the multiplicity of suits which may be brought as the coupons fall due

from year to year. The bonds were given in 1872, and run 20 years, so they have not matured. Various grounds are set out in the bill to show that the bonds are illegal, but the main question is whether, under the circumstances of this case, a bill of equity can be sustained, and we think that it cannot.

Of course, a bill in equity will lie for the purpose of preventing a multiplicity of suits; but here repeated suits have been brought, and judgments have been rendered against the party. There cannot, therefore, be any question as to whether there is an unreasonable and vexatious number of suits being brought, because the court has decided that the suits were properly brought and judgments have been rendered. There is not a single allegation in the bill which contains a true ground of equity, unless it is simply in consequence of threatened multiplicity of suits. There is not an objection stated in the bill to these bonds, except what is a valid objection at law, if at all, and therefore the only standing the bill can have is to prevent a multiplicity of suits. But here, as has been said, suits have been brought from time to time and judgments rendered, and can it be claimed, then, that there is threatened a vexatious number of suits against the town, and on that account a court of equity has jurisdiction? We think not. Again, we doubt very much whether it is competent, under the circumstances of the case, for these tax-payers to come in and ask for an equitable interposition of the court. There is no charge made against the town, no intimation that the town has been derelict in its duty, or has not contested these bonds in every way in which they could be contested, and it seems to be rather a stretch of equitable authority to claim that these tax-payers (the suit having been dismissed as to the town) can come in and obtain the relief which they seek. Besides, we may as well say that nearly every objection, and we believe every objection, made in the bill to the issue of these bonds has been repeatedly urged before the court, and as repeatedly held to be invalid, as against suits of any kind brought by *bona fide* holders of the bonds.

If the case, as of course it may, is to go to the supreme court, it is desirable that it should be put in a different form, so that the real questions upon which we have decided it should come before the appellate court; and I may as well say that, as there is a copy of the bond given in the bill, it will appear, from the allegations and recitals in the bond there given, that every question raised by the bill has been decided by this court.

The bill will therefore be dismissed.



## SCOTTISH-AMERICAN MORTGAGE CO. v. FOLLANSBEE and others.

(Circuit Court, N. D. Illinois. July, 1880.)

1. CLOUD ON TITLE—JUDGMENT CREDITORS MAY BRING SUIT.

A judgment creditor has the right to proceed by ancillary proceedings, in any other court of concurrent jurisdiction with the court rendering the judgments, to remove clouds from titles to any property which he deems to be subject to the lien of his judgments.

2. ANOTHER ACTION PENDING—WHEN NOT A BAR.

Where a party holds several judgments he may pursue his remedy as to each in separate courts, and the fact that there is a suit pending in one court involving substantially the same issues, and depending substantially on the same testimony, will not bar another suit in another court.

3. ESTOPPEL BY JUDGMENT.

A party is not estopped by a judgment rendered in an action to which he was not a party, although the former suit related to the same property.

In Equity.

*J. L. High and Theodore Sheldon*, for complainants.

*McCoy & Pratt and N. E. Partridge*, for defendants.

BLODGETT, D. J. I am very much adverse, although not more so than most courts, to these purely technical defenses which do not disclose the merits of the party's cause. And, without going further at the present time, I will simply say, with reference to the plea filed by the three defendants, Charles Follansbee, Frank H. Follansbee, and Frederick C. Tyler, that it strikes me very forcibly—*First*, that the plaintiff in these judgments had the right, as it obtained them, to proceed by ancillary proceedings in any other court of concurrent jurisdiction with the court rendering the judgments to remove clouds from titles to any property which it deemed to be subject to the lien of its judgments; and that this complainant could, therefore, even simultaneously, if it had two judgments in the superior court of Cook county against Charles Follansbee, have proceeded by a bill in equity to remove an alleged cloud upon the title of this same property, in two different jurisdictions, to enforce the two judgments. Although they might have been of kindred subject-matter, they are not the same, but are different suits. Each judgment makes a separate cause of action, and it seems to me that the plaintiff has a right to pursue his remedy as to each judgment in separate courts; and the fact that there was a suit pending in one court which involved substantially the same issues, and would have to be supported or defeated by substantially the same testimony, would be no bar to com-

mencing another suit in another court to be supported or met by the same testimony; in other words, the same questions might be litigated if they were not precisely in regard to the same subject-matter.

Further than this, the judgments not being rendered at the same time, the judgments now before this court not being rendered until after those upon which the bill was filed in the state court, I am very clear that when the plaintiff obtained its second series of judgments it had the right to go into another forum, if it chose, having jurisdiction of the subject-matter and of the parties, for the purpose of attacking any alleged fraudulent conveyances which interfered with or were interposed against its rights.

Moreover, this plea seems to me to be defective in not stating what the decree or judgment of the superior court of Cook county was upon the former bill in equity. For aught that appears by the plea, complainant may have gone into court and asked leave to dismiss, which may have been granted, and the defendants may have appealed from that order, as I understand may be done under the practice in the state courts. Defendants should have shown that there was an adjudication upon the merits in the superior court, in order to operate as a bar, since the appellate court has nothing but a revisory jurisdiction, and therefore it should be shown that the court of original jurisdiction did act or pass upon the merits of the cause.

I may be wrong in these views on first impression, but inasmuch as it strikes me that this whole case can be better met than by these pleas that stand right across the progress of the cause, I shall overrule this plea, with leave to these three defendants to set up so much of it as they may be advised, in their answer, so that the court may then see whether that shall be a bar to this suit or not.

With reference to the plea of Mrs. Follansbee, I am very clear that it contains nothing which can bar complainant from inquiring into the whole transaction between herself and her husband. It seems to me that there can be no estoppel and no bar by virtue of the suit between Mr. and Mrs. Follansbee in the superior court of Cook county. It is true that these judgments may have been obtained *pendente lite*, but that makes no difference in my view of the case. Complainant in this suit is bound by that decree no more than it would have been by a bargain between the parties. It is bound by no proceeding to which it is not a party, and is still at liberty to say that that was a voluntary conveyance by Mr. Follansbee to his wife, through Frank H. Follansbee and Frederick C. Tyler, and that this is merely a col-

orable title, and that the property should be subjected to these judgments. I am so clear upon this that I will not allow the defendant Mrs. Follansbee to answer this same matter.

The plea of Charles Follansbee, Frank H. Follansbee, and Frederick C. Tyler will be overruled, with leave to them to set up the matter of the plea in their answer. The plea of Mrs. Follansbee will be overruled, with leave to answer the bill upon the merits.

### UNITED STATES v. CLAYPOOL.

*District Court, W. D. Missouri, W. D. September Term, 1882.*

#### 1. CRIMINAL LAW—OBSTRUCTING MAILS—"KNOWINGLY AND WILLFULLY."

In the act of congress defining the crime of obstructing the passage of the mail, the terms "knowingly and willfully" are intended to signify that at the time of committing the offense defendant must have known what he was doing, and with such knowledge proceeded to commit the offense charged, and are used in the statute in contradistinction to innocent, ignorant, or unintentional.

#### 2. SAME—"PASSAGE OF THE MAILS."

By the terms "passage of the mails" are meant the transmission of mail matter from the time the same is deposited in a place designated by law or by the rules of the post-office department up to the time the same is delivered to the person to whom it is addressed.

#### 3. SAME—OFFENSE CONSTRUED.

Mail matter in the post-office, ready for delivery, and there for that purpose, is on its passage, within the meaning of the law, and to interfere with it so as to obstruct and retard its delivery is an offense.

#### 4. SAME.

Where a party commits an unprovoked assault upon a postmaster, the necessary result whereof was an obstruction and retarding of the passage of the mail, the law presumes that the defendant intended by his act the result which followed, and the offense is complete; but it is otherwise if the act was independent and disconnected from the post-office, and matters pertaining thereto.

#### 5. SAME—DRUNKENNESS NO EXCUSE FOR CRIME.

Drunkenness is no excuse for crime, and in the instances in which it is resorted to to blunt moral responsibility, it heightens the culpability of the offender.

Indictment for Obstructing the Passage of the Mail.

*Mr. Warner*, Dist. Atty., for the United States.

*Mr. Phelps*, for defendant.

KREKEL, D. J., (*charging jury*.) The post-office department, under the law, has established a post-office in the town of Higginsville, in Lafayette county, in the western division of the western district of Missouri, and John W. Enly has been appointed, and was, on the

twenty-eighth day of August last, postmaster of that office. The indictment in this case charges that on said day, while Enly, the postmaster, was in the discharge of his duties as such postmaster and in his office, the defendant Claypool knowingly and willfully obstructed and retarded the passage of the mails in his charge, thereby committing the offense for which he is upon trial. The terms "knowingly and willfully," employed in the law and in the indictment, have the common and usual meaning attached to them, and are intended to signify that defendant, Claypool, at the time of committing the offense charged against him, must have known what he was doing, and that with such knowledge he proceeded to commit the violations of law with which he is charged. The act of congress under which the indictment has been drawn reads as follows:

"Any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall for every such an offense be punishable by a fine of not more than \$100."

The offense here denounced is the knowing and willful obstructing of the passage of the mail. I have already spoken of the meaning of the terms "knowingly and willfully," and add by way of further explanation that they are used in contradistinction to innocent, ignorant, or unintentional; so that defendant, Claypool, by the acts he did, may have obstructed and retarded the mail in its passage, yet he is not guilty under the law if he did it innocently and without intending to do so. There is a distinction between the act of obstructing done while in pursuit of a legitimate or innocent object, and being done while committing an unlawful act. This distinction has been clearly pointed out by the supreme court of the United States in the case against one *Kirby*, 7 Wall. 482, and I present it to you in the language of Justice FIELD, who delivered the opinion of the court:

"The statute of congress, by its terms, applies only to persons who 'knowingly and willfully' obstruct or retard the passage of the mail or of its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been its primary object."

As to this branch of the case, with so clear and pointed exposition of the law, you can have no difficulty in its application to the facts of the case you are to determine.

I pass to the definition of the terms "passage of the mail" and their meaning. The provision of the law as read, found in the revision of

the laws of the United States of 1878, are taken from the law of 1825, where they are found in different connections from those in the Revised Statutes. Without stopping to point out how statutes in their construction are sometimes affected by their connection, I instruct you that by the terms "passage of the mails" are meant the transmission of mail matter from the time the same is deposited in a place designated by law or the rules of the post-office department up to the time the same is delivered to those to whom it is addressed. I incline to this view because without such a construction the mail matter in post-offices has but a limited protection by law, and because a larger and complete protection is certainly within the spirit of the law. The argument of legislative intent must yield to the necessity of the case, and is anticipated by provisions of law. St. 1878, (Rev. St. § 5600.) Applying this construction of the law, as here given, to the case in hand, you are directed that if you shall find from the evidence that the acts done and committed by the defendant, Claypool, obstructed or retarded the receiving or delivery of mail matter at the post-office at Higginsville, as charged in the indictment, you may find the defendant guilty so far as this branch of the case is concerned. Mail matter in the Higginsville post-office, (at the time of the alleged interference by Claypool,) ready for delivery, and there for that purpose, was on its passage within the meaning of the law, and to have interfered with it so as to obstruct and retard its delivery is an offense.

It remains to be seen how far an interference with the postmaster is a knowing and willful interference with the passage of the mail, so as to obstruct and retard it. Upon this branch of the case you are instructed that if you shall find from the evidence that Enly, the postmaster, on the afternoon of the twenty-eighth day of August, went from the place in the room where the post-office is located to the door for the purpose of inviting or inducing the personal encounter which then followed, he must bear the consequences; and it makes no difference whether he happened to be a postmaster. If the postmaster or his postmastership had no connection with the difficulty between him (Enly) and Claypool, defendant, but was independent and disconnected from the post-office and matters pertaining thereto, you are authorized, on such a conclusion being arrived at by you from the testimony, to find the defendant not guilty. But, on the other hand, if you shall find from the testimony that Claypool committed an unprovoked assault upon Enly, the postmaster, and the necessary result

thereof was an obstruction and retarding of the passage of the mail, the law presumes that by his act Claypool intended the result which followed; and you may, upon arriving at such a conclusion, find the defendant guilty.

Under any view taken of the case, an obstruction or retarding of the mail must have been the consequence of and followed from Claypool's acts. Drunkenness is no excuse for crime, and, in the instances in which it is resorted to, to blunt moral responsibility, it heightens the culpability of the offender.

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UNITED STATES *v.* WATTS.

(*District Court, D. California. November, 1882.*)

FUGITIVES FROM JUSTICE—EXTRADITION TREATY CONSTRUED.

An extradited fugitive cannot, under the treaty of 1842 between the United States and Great Britain, be held to answer for any other offense than that for which he has been surrendered.

HOFFMAN, D. J. The prisoner having been arraigned on three indictments found against him in this court interposed a plea to the jurisdiction of the court to the effect that he had been extradited by Great Britain at the request of the United States; that the offenses charged in the requisition, and on which he has been surrendered, are other and different offenses from those alleged in the indictments to which he is now called on to plead; and that the said last-mentioned offenses are not mentioned or enumerated in the treaty between the United States and Great Britain; wherefore he says that he cannot and ought not to be put on his trial for such offenses, or restrained of his liberty, except to answer to the offenses for which he was extradited. To this plea the United States demurred. The validity of the claim set up on the part of the prisoner depends on the solution of two questions: *First.* What is the true construction of the tenth article of the treaty of 1842 between the United States and Great Britain? *Second.* How far are the judicial tribunals of the United States and of the states required to take cognizance of, and in proper cases give effect to, treaty stipulations between our own and foreign governments?

At the outset of the discussion two propositions may be laid down as incontrovertible: *First.* Whatever speculative views may have

been taken by jurists of America as to the duty of sovereign states, on grounds of comity or by the laws of nations, to deliver up fugitives on the demand of foreign states whose laws they are charged with having violated, in the United States it has long been the established rule "neither to grant nor to ask for extradition of criminals, as between us and any foreign government, unless in cases for which stipulations have been made by express convention." 6 Op. Atty. Gen. 431; *Com. v. Hawes*, 13 Ky. 697; *Holmes' Case*, 14 Pet. 593; Law. Wheat. Internat. Law, 233. *Second*. "A treaty is in its nature a compact between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, except so far as its object is infraterritorial, but is carried into execution by the sovereign powers or the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision." *Foster v. Neilson*, 2 Pet. 253, per Chief Justice MARSHALL. "When, therefore, it is provided by treaty that certain acts shall not be done, or that certain limitations and restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations, or to exceed the prescribed restrictions, for the palpable and all-sufficient reason that to do so would be, not only to violate the public faith, but to transgress the 'supreme law of the land.'" *Com. v. Hawes*, 13 Ky. 702.

It results as a necessary consequence of the duty imposed on the courts to respect and obey the stipulations of a treaty as the supreme law of the land, that they are also charged with the duty of determining its meaning and effect, and this duty they must conscientiously and firmly perform, even though the construction they feel compelled to give to it should differ from that given to it by the political branch of the government.

In the long and able correspondence between Mr. Fish and Lord Derby, with reference to the extradition of Winslow, the position apparently assumed by the latter at the outset, to the effect that the British government might, by act of parliament, modify and introduce new conditions into an existing treaty with the United States, without the assent of the latter, seems to have been virtually abandoned. The ground finally taken by Lord Derby was that-

"The act of parliament in question (that of 1870) imposed **no** condition new in substance upon the treaty of 1842, inasmuch as the true meaning of that treaty is that a person accused of a specified crime or specified crimes shall be delivered up to be tried for the crime or crimes of which he is accused, and an agreement between the two powers that the right of asylum equally valued by both shall be withdrawn only in respect of certain specified offenses, implies as plainly as if it were expressed in distinct words that in respect of the offense or offenses laid to his charge, and such offense or offenses only, is the right of asylum withdrawn; and that as a consequence, independently of the act of 1870, it is the duty of each government to see that the treaty obligations in that respect are recognized and observed by the receiving power." Lord Derby to Col. Hoffman, June 30, 1876.

Mr. Fish, on the other hand, contended that the receiving power has the right, if so inclined, after having tried the extradited person on the charge on which he has been surrendered with a *bona fide* intent and effort to convict him on that one charge, to try him for any other offense of which he may have been guilty. Mr. Fish to Mr. Hoffman, May 22, 1876; Messages & Doc. Dep. State, 1876-77.

With this important and irreconcilable divergence of opinion between these eminent statesmen the correspondence terminated, and the United States for a time declined to make or entertain any demand for the surrender of fugitives under the treaty. That it has since gone into operation is evident; but upon what adjustment, if any, of the controverted question the court is not informed. But it is understood that the assertion by the district attorney of the right and of his purpose to try the prisoner for offenses other than those for which he was surrendered, and which are not extradition crimes, is not made under express instructions from the government. The court, however, must regard him as its representative, and as acting under its authority, and must determine the questions submitted to it as if his action were taken by its express direction.

There is no reason to suppose that when the treaty was negotiated Lord Ashburton or Mr. Webster intended that the rights it conferred, or the obligations it imposed, should be other than those usually considered to result from similar agreements for the extradition of fugitives from justice. The opinions, therefore, of juriconsults and writers of eminence on international law may profitably be consulted, to ascertain what, in their judgment, are the rights and duties of the receiving power to whom a fugitive has been surrendered for trial for a specified offense.

In the memorable debate in the house of lords on Earl Granville's motion for further correspondence respecting extradition, the lord



chancellor, in an elaborate defense of the position assumed by Lord Derby, reproduces the opinions of the great jurists of the continent whom he had consulted. He cites Faelix, Kliut, and Heffter, and a case mentioned in Dalloy's Jurisprudence. It is unnecessary to incumber this opinion by inserting at length the various citations from those authorities contained in the speech of his lordship. It will be sufficient to state one of the general rules laid down by Faelix "The person who is surrendered cannot be prosecuted or condemned except for the crime in respect to which his extradition has been obtained." The other authorities are equally explicit. Indeed, there seems, so far as I can discover, a common *consensus* of jurists on the subject. See 10 Am. Law Rev. 618, and authorities cited.

In the circular of the French minister of justice of 1841, the theory of the French law on the point under consideration is laid down with great fullness: "The order of extradition," he says, "states the act upon which it is founded, and that act alone should be investigated; whence it follows that if during the trial of the crime for which extradition has been granted proofs are discovered of another crime, a new demand in extradition must be made." He goes further and holds that even if the surrender be made for a crime and also for a misdemeanor, the accused can only be put upon his trial for the former. After observing that "extradition should never be claimed or granted for trifling offenses," he adds: "Il faut une raison puissante pour faire rechercher sur la terre étrangère l'homme qui s'est puni par l'éloignement volontaire de sa patrie."

"Extradition can only be admitted with regard to a person accused of an act punishable with severe and degrading punishment, (*peine afflictive ou infamante*;) that is to say, of a crime other than a political crime, and not of a misdemeanor, (*delit*.) It follows that if extradition has been obtained of a person accused at once of a crime and a misdemeanor, he ought not to be put on his trial for the misdemeanor." Cited in Clarke, Extrad. c. 11, p. 161.

This rule would *a fortiori* apply when it is proposed to try the person extradited for an offense for which his surrender could not have been asked and would not have been granted.

It is manifest from the foregoing that the position taken by Lord Derby finds abundant support in the opinions of continental jurists, and in the practical interpretation given by France to the rights acquired by the extradition of a criminal.

I now come to the treaty itself.

It enumerates seven crimes for which the surrender of the fugitive may be demanded. It will not be disputed that this enumeration is exclusive, and that the fugitive can be demanded for the enumerated crimes and for none others. No clearer case for the application of the familiar rule *expressio unius est exclusio alterius* can easily be imagined. But if any doubt be felt on the point it will be dissipated by adverting to the language of President Tyler in his message communicating the treaty to congress:

"The article on the subject in the proposed treaty is carefully confined to such offenses as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses and criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels, desertions from military service, and other offenses of a similar character are excluded."

It is true that the treaty does not in terms prohibit the trial of the surrendered fugitive for crimes other than those mentioned in the treaty. "But, [as is well said by the supreme court of Kentucky in *Com. v. Hawes*,] if the prohibition can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes the contracting parties had in view, and the nature of the subject about which they were treating, it is entitled to like respect and will be as sacredly observed as though it were expressed in clear and unambiguous terms." 13 Ky. 704.

To what end this careful and exclusive enumeration of offenses, if, after surrender for any one of them, the person may be tried for other offenses not included in the enumeration? And what, on such a construction, becomes of the guaranty and safeguard relied on by President Tyler? Can it be supposed that the eminent persons by whom the treaty was negotiated in effect said to each other: "You shall not demand nor will we surrender a fugitive except for the enumerated offenses; but if you can make out a *prima facie* case against him for an extradition crime, you may, after trying him for that crime and after an acquittal, which may show that he never should have been demanded or surrendered, try him for any other offense he may have committed?"

Nor is it easy to see how the surrendered person is protected from trial for a political offense, if this construction of the treaty be admitted. If he can be tried without violating the letter or spirit of the treaty for any non-enumerated offense, why not for a political

offense? It has been said that public sentiment in Great Britain and the United States would render such a proceeding impossible. But President Tyler rested the guaranties of immunity to political refugees on something more stable and reliable than the prevailing public sentiment of either country. He evidently thought that they were to be implied from the treaty itself.

It has been urged that the right of asylum for political offenders is so universally recognized as sacred and inviolable that an infringement of it was, like a parricide at Athens, not to be treated as possible. But jurists of the same country are not always agreed as to what constitutes a political offense. Nor on a question so often difficult and delicate can it be expected that two governments will always be of one mind. If, then, the right of the receiving power to try the surrendered person for any offense of which he may have been guilty (having first tried him *bona fide* for the extradition offense) be admitted, it might well happen that the receiving power might in perfect good faith hold the prisoner to answer for an offense which the surrendering power would consider strictly political in its character. But the treaty is explicit that the surrendering power is the sole and final judge, not only of the adequacy of the proofs submitted on a demand for a surrender, but of the question whether the facts proved constitute an extradition offense under its laws, and especially whether under those laws the offense is political in its character. On the construction contended for this right would practically be denied, and the immunity of political offenders so jealously maintained and carefully guarded by both the contracting parties might thus effectually be destroyed.

The legislation of both Great Britain and the United States appears to have given a practical construction to the treaty in accordance with the views I am attempting to maintain. The British act of Parliament of 1843, which was passed to carry into effect the treaty of the preceding year, provides (section 3) that "upon the certificate of a justice of the peace," etc., "it shall be lawful for one of Her Majesty's principal secretaries of state, \* \* \* by warrant, under his hand and seal, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed, and to convey such person to the territories of the United States *to be tried for the crime of which such person shall be so accused.*" The words "and for that crime alone," or "for none other," are not, it is true, found in the act, but

the motive and object of the surrender are so explicitly stated that the statute, on every principle of fair and rational interpretation, should be construed as if those or equivalent words had been inserted. The language of our own act of congress of 1848 is identical with that of the British act. It directs the person so committed to be delivered, etc., "*to be tried for the crime of which such person shall be so accused.*"

The same language is used in the warrant under which the fugitive is surrendered. But if, by a fair construction of the treaty, the extradited person, after being tried for the offense of which he has been "so accused," may be tried for any other offense, neither the law nor the warrant express the whole object of the surrender. Will it be contended that any secretary of state would venture, under the act, to issue a warrant directing the surrender of the fugitive to be tried for the offense of which has been accused, and, after such trial, to be tried for any other offense which may be charged against him? To put this question is to answer it.

I will now briefly advert to the authorities. The first to which I shall refer is the case of *Com. v. Hawes*, already frequently cited in this opinion, and the able, conclusive judgment in which I have freely availed myself of, without, I fear, adding much to its force. The prisoner had been surrendered by the authorities of the dominion of Canada for the crime of forgery. On this charge he had been tried and acquitted. He was then required to plead to an indictment for embezzlement. The court refused to try him for that offense, and directed his discharge. The ruling of the court was unanimously affirmed on appeal by the court of appeals of Kentucky. It will be noted that this decision was rendered in April, 1878, long subsequently to the correspondence between Mr. Fish and Lord Derby, and with full knowledge of the decisions in *Caldwell's Case*, and *Lawrence's Case*, hereafter to be noticed. It will also be observed that in this case a state court declined jurisdiction of an offense committed within the territory of a state. The court holds: (1) That the trial of extradited criminals for crimes other than those *named in the treaty and in the warrant of extradition* is not prohibited in terms by the treaty of 1842; but such prohibition is clearly implied from the language and general scope of the treaty, and this prohibition should be as sacredly observed as though it were expressed in clear and unambiguous language. (2) The right of one government to demand and receive from another the custody of an offender who has sought an asylum upon

its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty.

The same conclusion was reached by the supreme court of New York in the case of *Adriance v. Lagrave*, 1 Hun, 689. The court holds that—

“When the defendant was extradited it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being absolutely beyond the reach of the laws of this state, he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime for the commission of which he was removed from the protection of the laws of France. Beyond that, he was entitled to the protection of those laws so far as his personal liberty would have been secured by them in case no removal of his person had been made. In the language of the treaty, he was delivered “up to justice” because he was accused of one of the crimes which it enumerated, and it was implied in his surrender that he should be at liberty to return again to France when the purposes of justice had been performed in the charge made against him. The nature of the treaty, as well as good faith with the foreign power entering into it, will permit no other construction.”

The prisoner was in this case discharged from *arrest on civil process*. This judgment was reversed by the court of appeals in 59 N. Y. 110, but not upon any claim that on the principles of international law or by the terms of the treaty a prosecution for an offense other than the offense for which surrender has been made was permissible. On the contrary, the immunity claimed is pronounced by the court “eminently just in principle.” The decision turned upon the supposed inability of the court to interfere. After referring to the British act of 1870, the court observes:

“Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject is confided to the federal government. It has exercised this power by passing an act to protect fugitive criminals from lawless violence.” 15 St. at Large, 337. “*That these provisions ought to be extended to protection from other prosecutions or detentions I do not doubt; but until this is done by the law-making power by treaty or statute, we feel constrained to hold that the courts cannot interfere.*”

The question whether the treaty did not contain by necessary implication a prohibition against the prosecution of the offender for any other crime than that for which he is surrendered does not seem to have been considered by the court, and much reliance is placed on the supposed interpretation of the treaty by the law officers of the crown in *Burley's Case*—a case so frequently mentioned in the correspondence between Mr. Fish and Lord Derby. The decision of the

court of appeals was rendered in 1874, long prior to the protracted and exhaustive discussion of the whole question in that correspondence and the debates in the house of lords. It may be added that two judges, one of whom was Mr. Justice FOLGER, the present secretary of the treasury, dissented.

*The Case of Caldwell*, 8 Blatchf. 131, upon the authority of which the subsequent *Case of Lawrence* was decided by the same judge, appears to have been treated by him as a question, not of jurisdiction, but of privilege from arrest. The provisions of the treaty, and the question considered by the Kentucky court as to prohibitions impliedly contained in it, do not appear to have been considered, nor is any reference made to the rules of international law, the opinions of foreign jurists, or the practice of civilized nations. The opinion seems to proceed on the erroneous supposition that Great Britain had definitely acquiesced in the construction contended for; and the *Case of Heilbroun*, so fully explained in subsequent discussions, is cited as a precedent, if not an authority. The decision, it may be added, was rendered in 1871, five years before the *Case of Winslow* arose. With the greatest respect for the eminent judge who decided this case, I am compelled to dissent from his conclusions.

The suggestion of the learned attorney general, in his opinion on the *Case of Lawrence*, that it was intended at least by Mr. Webster, by whom the treaty was probably drawn, to extend the practice with which he was familiar in cases of surrender of fugitives from justice between the states to cases of fugitives escaping into Canada, admits of an obvious answer. The states of this Union do not occupy towards each other the relation of foreign states, in the sense in which that term is applied to Great Britain or France. All the citizens of the states are citizens of the United States. They are in no sense aliens to each other. The distribution of powers between the states and the federal government requires that offenses against state laws should be prosecuted within the jurisdiction, the laws of which have been violated, but no right of asylum is gained by flight into another state. If the offender has violated the laws of the United States, he may be arrested without requisition or extradition wherever found within the limits of the Union.

The act of congress passed to carry into effect the constitutional provision for surrender of fugitives between the states, enacts that upon the demand of the executive authority of any state or territory, for the surrender of any fugitive from justice, and on the production of an indictment found, or an affidavit made before a magistrate of

any state or territory charging the person demanded "*with treason, felony, or other crime*, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested," etc. Under this statute it has been held that no inquiry into the probable guilt of the fugitive can be made. The only inquiry is whether the warrant on which he is arrested states that the fugitive has been demanded by the executive of the state from which he is alleged to have fled, and that a copy of the indictment, or an affidavit charging him with having committed "*treason, felony, or other crime*," certified by the executive demanding him as authentic, has been presented. Whatever the statutes of the demanding state make indictable is a crime within the constitution and law of congress on the subject. *In the Matter of Clark*, 9 Wend. 212. As the fugitive may be demanded for any crime, and as the surrendering state has no power to inquire into his probable guilt, or whether the crime for which he is demanded is made such by its own laws, it follows that when surrendered he may be tried for any crime he may have committed. But that fact lends no countenance whatever to a similar claim on the part of the receiving power under an extradition treaty with a foreign nation.

It remains to be determined whether the immunity from prosecution for crimes other than that for which the fugitive has been surrendered can be enforced by the court, or only by the intervention of the political branch of the government. This point has already been incidentally considered. If I am right in supposing, with the court of appeals of Kentucky, that the treaty, by necessary implication, prohibits the trial of the offender for any offense but that for which he has been extradited, the question is answered. The treaty is "the supreme law of the land," and as binding on the courts as a statutory enactment. If it contained an express prohibition the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows.

It may be added that, assuming that the receiving power has no right to try the fugitive except for the offense for which he has been surrendered, the immunity so guarantied is a right of the prisoner, and can be far more surely and conveniently asserted before the courts than by diplomatic intervention. The wealthy and influential criminal might generally be able to secure the interposition of

the surrendering government for his protection. But the poor and obscure offender might have no means of drawing the attention of that government to his case. It would be inconvenient, if not impossible, for the ambassador of the surrendering power to keep his eye on every case of an extradited fugitive with a view of interposing in case he should be put to trial for any other crime than that for which he was surrendered. If the protection of the fugitive be left solely to the political or executive power, the attempt to afford it would in the United States be attended by peculiar difficulties.

In cases where the extradition has been obtained for an offense against the laws of the United States the president could easily interfere, by directing the district attorney to abandon the prosecution. But when the criminal has been surrendered for an offense against the laws of a state, (as most frequently happens,) neither he nor the governor of the state has any such power. The latter may pardon, but he cannot control the district attorney or the court. In his correspondence with Lord Derby, Mr. Fish declared his inability to give the assurance demanded by the latter. If, therefore, the immunity of the fugitive cannot be enforced by the courts, it can in the United States be effectively secured only by an amendment to the treaty or by an act of congress, as suggested by the court of appeals of New York in the case heretofore cited. But this, for the reasons I have given, I believe to be unnecessary.

The only question presented for decision in the present case is whether a surrendered fugitive may be tried for an offense other than an "extradition crime." The principles attempted to be maintained, and the authorities cited, prohibit his trial for any other offense than that for which he has been surrendered. This prohibition, if rigorously applied, might often defeat justice. If, for example, the surrender be for an attempt to commit murder, and after surrender the person assaulted should die, or if (supposing larceny to be an extradition crime) the fugitive should be surrendered for robbery or burglary, and on examination of the proofs they should be found insufficient to show the force in the one case, and the effraction of the premises in the other; or if he should be surrendered for larceny and the offense should turn out to be embezzlement, or *vice versa*,—in these and similar cases the application of the rule would work a failure of justice. But it would not be difficult to provide for them by new treaty stipulations. It might be agreed that the extradited offender should be tried for the crime for which he has been surrendered, or for some other extradition crime based on the same facts or growing



out of the same transaction. In this or some other way the statesmen of the two countries, whose interests and objects in this matter are identical, could surely devise means which, while the right of asylum would be sufficiently protected, would at the same time prevent that right from being so used as to afford immunity for crime. Demurrer overruled.

### HILES and others v. CASE, Receiver, etc.

(Circuit Court, E. D. Wisconsin. December, 1880.)

#### 1. RAILROAD COMPANY—DEFAULT IN PAYMENT OF MORTGAGE DEBT.

No relation of principal and agent, either in law or equity, is implied from the mere fact that the railroad company continues to operate its road after default in payment of the mortgage debt, nor from the further fact that the bondholders did not take possession after such default, nor from both facts combined.

#### 2. SAME—RECEIVER—PRIORITY OF CLAIM TO NET EARNINGS.

A cause of action against a railroad company for damages for the destruction of property along the line of its road, by fire escaping from defective locomotives, is in no proper sense to be considered such a claim as to constitute part of the operating expenses of the road, and is wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which are sometimes ordered paid from the net earnings in the hands of a receiver, as presenting equities superior to those of the bond-holders.

*George H. Noyes and G. C. Prentiss*, for petitioners.

*E. C. & W. C. Larned and T. G. Case*, for receiver.

DYER, D. J. The petitioners above named have presented petitions for the allowance of claims to a large amount against the receiver of the Green Bay & Minnesota Railroad, who is operating the road under the direction of this court, pending the foreclosure of certain mortgages upon the property, which demands are for loss and damages claimed to have been sustained by the petitioners in the destruction of timber and cranberry marsh, along the line of the road, by fire alleged to have been set by sparks escaping from defective locomotives. By suitable and separate allegations it is charged that the fires which caused the damage occurred on different days, in different years, and it is thus made to appear, in each of the petitions, that one of these fires occurred on the seventh day of September, 1877, which was more than four months before a foreclosure of the mortgage in suit was commenced, and before a receiver was appointed.

To such parts of the petitions as thus, allege, as causes against the receiver, loss and damage by fire while the road was being operated by the railroad company, and before it passed into his hands, the receiver has demurred, and the demurrer raises the question whether such claims can be allowed or entertained against him or the property which he has in charge for the bondholders, or against any party other than the railroad company, by whose negligence it is alleged the loss and damage were occasioned.

In *Hale v. Frost*, 99 U. S. 389, it was held that the net earnings of a railroad, while it is in the possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to those of the bondholders. To sustain the claims in question, it is therefore necessary that some equity be found in favor of the petitioners, and superior to that of the bondholders, upon which to base their allowance; and the supposed equity is that the fire in question occurred after default on the part of the railroad company in payment of the mortgage debt or interest; that thereafter the company operated the road as the agent or trustee in equity of the bondholders, and that the alleged liability sought to be enforced in the present proceeding arose from such operation of the road, and as an incident thereto; that therefore it may be put under the head of operating expenses, and so acquire rank as a claim enforceable against the earnings of the road in the hands of the receiver. There is some plausibility in the argument, but it is unsound. No relation of principal and agent, either in law or equity, can be implied from the mere fact that the railroad company continued to operate the road after it was in default in payment of the mortgage debt, nor from the further fact that the bondholders did not take possession of the property after such default, nor from both facts combined. The mortgages gave to the mortgagees the right to take possession after default, but they were not obliged to do so, nor was it necessary that they should take possession in order to avoid such a liability as is here claimed. The railroad company was operating the road when the alleged loss and damage occurred. The negligence of the company, if there was negligence at all, occasioned the loss. For that negligence it alone was responsible. To sustain the position taken by the petitioners it must be held that the bondholders at least impliedly assumed liability for the negligence of the railroad company, and that by operation of law this mortgage security was subordinated to claims of the character of these. I cannot so hold. The alleged cause of action accrued after the company had given mortgages upon all its property, which were

then subsisting liens, and before the receiver was appointed. It can make no difference that they accrued after the company was in default of payment of interest on its bonds. The road was still being operated by the company, and whatever liability existed must have been one against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which the court sometimes orders paid from net earnings in the hands of a receiver, as presenting equities superior to those of bondholders.

If such claims as are here in question could be allowed, there would seem hardly to be a limit to the allowance of demands which it might be as forcibly argued were superior in their equities to those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing, and perhaps destroying, an otherwise valuable security.

The demurrer to such parts of the petition as state causes of action against the railroad company, accruing prior to the appointment of the receiver, is sustained.

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### HIGGIE and others v. AMERICAN LLOYDS.

(*District Court, N. D. Illinois.* November 5, 1882.)

#### 1. MARINE INSURANCE—REPRESENTATIONS—AS PART OF CONTRACT.

A positive representation as to a material fact is as essentially a part of the contract as a warranty, and must be substantially true, or if untrue it will operate as a release of the obligor thereunder.

#### 2. MARINE RISK—POLICY, WHEN VOID.

On a voyage policy of insurance whereby the underwriters assumed to insure the freight list of a vessel "lost or not lost" for a voyage at sea, the condition of a vessel in respect to her seaworthiness, at the time of the commencement of the risk, is a material part of the contract, and a misrepresentation in this respect will render the policy void.

#### 3. SAME—WARRANTY—SEAWORTHINESS.

There is an implied warranty of seaworthiness at the time of the inception of the risk in case of a marine insurance, and where a vessel encountered no extraordinary peril, and no gale or storm which would have imperiled a staunch, strong vessel, and she rolled heavily upon the waves produced merely by trade winds, and leaked badly, her unseaworthiness at the commencement of the voyage will be presumed, and unless rebutted by evidence the contract of insurance is void.

**4. SAME—ESTOPPEL BY RECEIPT OF PREMIUM.**

Where the loss had occurred before respondent became aware of the fact of unseaworthiness at the time of the inception of the risk, or of the misrepresentation as to the rating of the vessel, the fact of their not returning or offering to return the premiums paid until the hearing of the case will not estop respondent to deny the validity of the policy.

*Robert Rae*, for libelants.

*David Fales* and *C. E. Kremer*, for respondent.

BLODGETT, D. J. This is a libel on a contract of insurance made by the respondent with the libelants as owners of the schooner *G. G. Cooper*, whereby respondent insured the freight list of the schooner for a voyage from Las Palmas, in the Canary islands, to Rio Janeiro, Brazil, in the sum of \$1,800; the certificate of insurance bearing date July 8, 1879, and having been issued from the office of the agent of the respondent in the city of Chicago on the application of the owners of the schooner.

Two defenses are urged by the respondent to the claims of the libelants: *First*, that the vessel whose freight list was so insured was not seaworthy at the time of the commencement of the risk; *second*, that the policy of insurance was obtained upon false representations as to the rating and classification of the schooner for insurance purposes by the "American Lloyds."

It appears, from the proof in the case, that the schooner in question was built upon the waters of Lake Erie in the year 1863; that she was about 310 tons burden, and what was known as a "canal vessel,"—that is, a vessel narrow enough to pass through the Welland canal; that in the season of 1878 she was taken through the canals to Montreal, and there inspected by the agents of the "American Lloyds," and classed for insurance purposes A 1½. During the latter part of the year 1878 she made a voyage from the St. Lawrence river to Falmouth, England, with a cargo of deals, encountered much rough weather, and arrived at Falmouth considerably out of repair. From her arrival at Falmouth the American Lloyds reported the certificate of classification given by that society as suspended. At Falmouth she took on a cargo of coal for Gibraltar, and on her voyage through the Bay of Biscay met with such disaster from rough weather that she was obliged to put into the port of Cadiz, Spain, in a dismantled and wrecked condition, where she was surveyed and examined under direction of the American consul at that port and condemned to be sold as unseaworthy. At the offer of sale made in pursuance of this condemnation no bidders appeared and no sale was effected.

One of her owners shortly after arrived at Cadiz, and, under the instructions or advice of the American consul at that port, proceeded to repair the vessel, and during the winter placed such repairs upon her as he was advised entitled her to be restored to her former rating, and a certificate to the effect that she had been restored was indorsed upon the original certificate of classification given by the American Lloyds in July, 1878, by a Mr. Benjamin G. Haynes, who was represented as the agent of the American Lloyds at Cadiz. Some time during the month of March the schooner took on board a cargo of about 445 tons of salt, to be transported from Cadiz to the port of Rio Janeiro, Brazil. She also had on board, besides her crew, about twenty passengers for Rio Janeiro. She sailed from Cadiz upon her voyage to Rio Janeiro about April 17, 1879, made the port of Tangiers, Morocco, where she remained a few days, and, proceeding on her voyage, arrived at Las Palmas, in the Canary islands, about the nineteenth of May. From this point her master addressed a letter to W. F. Higgin, one of her owners in this city, which was received here in due course of mail, stating that he would sail from Las Palmas in continuation of his voyage on the twenty-first of May, and on that day he did set sail in prosecution of his voyage from Las Palmas, and shortly after leaving that port encountered a heavy sea, causing the vessel to roll badly, and during the night of the 21st and the morning of the 22d the vessel was found to be leaking to such an extent that the master, at the instance of his crew and passengers, deemed it best to make a port of safety, and accordingly put in at the port of Santa Cruz, in the island of Teneriffe, distant from Las Palmas only about 54 miles, where she arrived on the afternoon of the 22d. Soon after the arrival at the latter port, the second mate and some of the seamen made complaint to the American consul resident there that the schooner was unseaworthy and unfit to continue her voyage, and a survey was ordered by the consul, which resulted in a report from the surveyors to the effect that the vessel was wholly unseaworthy, and unfit to pursue and complete her voyage, and such proceedings were taken by the consul that the vessel was condemned and ordered to be sold, and she subsequently was sold in the port of Santa Cruz, Teneriffe, under the order of condemnation, and her voyage to Rio Janeiro was thereby broken up. The captain not being able to obtain another vessel in which to transport her cargo to the port of destination, the salt was stored, under the direction of the consul at Santa Cruz, and no freight was earned thereon.

On or before July 8th, and after the receipt of the letter from the master, dated at Las Palmas, W. F. Higgin, one of the libelants residing here, applied to the agency of the respondent in this city for insurance of \$1,800 upon the freight list of the schooner. The agent had in some way become advised of the fact that the schooner had been condemned the winter before at Cadiz, and disrated by the American Lloyds, but he was informed by Mr. Higgin that he had, under the instructions of the American consul at Cadiz, put such repairs on the vessel that she had been fully restored to her rating, and was then rated A 1½ by the American Lloyds.

Considerable testimony has been put into the record bearing upon the question of the condition of the vessel at the time she left the harbor of Cadiz, the testimony on the part of the libelants tending to show that she received repairs to the extent of over \$6,000, and that after she had been so repaired the indorsement was made upon her certificate of classification, which had been given her in Montreal, stating that she had been restored to her former rating.

This being a voyage policy whereby the underwriters assumed to insure the freight list of this vessel, "lost or not lost," for the voyage from Las Palmas to Rio Janeiro, the condition of the vessel in respect to seaworthiness at the time she left Las Palmas, which was the time the risk commenced, becomes a material matter of inquiry.

The defense insists that she was unseaworthy at the time she left the port of Las Palmas, and in support of this assumption has produced the testimony of the surveyors by whom she was examined and condemned at Santa Cruz, from whose testimony it appears that her timbers were found to be badly rotted, her butts sprung, and her condition such that she would not hold her caulking nor fastenings, and could not be made seaworthy by ordinary repairs. It is therefore contended by respondent that the condition in which the vessel was found when examined at Santa Cruz is substantially the condition in which she left Las Palmas, she having been out only one day between Las Palmas and Santa Cruz, and not having encountered any very severe storm. The testimony of the master of the vessel does not, I think, justify the conclusion that the storm was of a very severe character. He says, in answer to the forty-ninth question, on his direct examination: "After we left Las Palmas she encountered heavy weather. There is a trade-wind down there which makes a very heavy sea; they shook her up pretty lively; she rolled very heavy; first one way under, and then the other way under." In answer to the fifty-first interrogatory he says: "We had to reef sails and shorten things down. Between midnight

and morning, found she was making more water than usual; at daylight was making water very badly,—so much so it was thought best to make a port of safety, and find out whether we could do anything to stop the leaks." He also says: "While in the roads at Santa Cruz she did not seem to make so much water as while at sea; found some leaks above the water which we stopped by caulking. After the recaulking everything was all right, and I was willing to proceed on my voyage."

It clearly appears from the testimony of the master that he did not think the vessel unseaworthy when she arrived at Santa Cruz, and that he did not think her condition very much changed after she arrived there from what it was when she left Las Palmas, nor did he think she had encountered such a peril of the sea as to disable her and make her unfit to perform the voyage; while it most manifestly appears from the testimony of the surveyors, who seem to have been candid and impartial men, one being the master of an English bark, another the master of a Norwegian bark which happened to be in the port of Santa Cruz at the time, and the other a ship carpenter residing at Santa Cruz, that the condition of the vessel's timbers was such from rottenness that she was not fit to complete the contemplated voyage; and I cannot, in the light of the testimony in the case, considering the history, age, and build of the vessel, believe that she was in a sound and seaworthy condition at the time she commenced this voyage; that is, at the time she left Las Palmas for Rio Janeiro. It seems very clear to me that if her timbers had been sound she could have been readily repaired from any damage she sustained on the night of the 21st, between Las Palmas and Santa Cruz, so as to have proceeded without danger upon her voyage; but it is probable that the rolling which she encountered did develop the inherent rottenness to such an extent as to cause her to leak, and to cause alarm among her seamen and passengers, who demanded the survey which resulted in her condemnation.

In *Cort v. Washington Ins. Co.* 2 Wash. C. C. 375, it is said:

"If a vessel, after the commencement of her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary peril of the sea, this may raise so strong a presumption of unseaworthiness at her departure as to require strong evidence to repel the conclusion."

And I must say that I do not think the libelants' testimony overcomes this presumption. There was no extraordinary peril encountered; the vessel rolled heavily upon the waves produced by the trade-

winds. There was no gale, no storm such as would have imperiled a staunch, strong vessel. Assuming it to be a well-settled rule of insurance law that there is an implied warranty of seaworthiness at the time of the inception of the risk,—which position is fully sustained by the following authorities, and many others which might be cited: 1 Parsons, Mar. Ins. 367; Phil. Mar. Ins. 378; *Hazard v. Ins. Co.* 8 Pet. 578; *McLanahan v. Ins. Co.* 1 Pet. 170,—I must hold that this warranty was broken by reason of the unseaworthiness of the vessel at the time the voyage commenced, and the risk never attached, and the policy is therefore void. If the vessel was not seaworthy at the commencement of the voyage, then this contract of insurance never became binding upon the underwriters, because the contract was made upon the implied warranty of seaworthiness.

The proof also shows quite satisfactorily that this policy was issued upon representations made to the agent of the underwriters that the schooner was, at that time, classed A 1½ in the American Lloyds, and that this policy would not have been issued but for this representation; the American Lloyds being an association whose business is to inspect and classify vessels for insurance purposes, and this respondent as well as most underwriters of ocean risks adopting the rating or classification of the American Lloyds for the purposes of their business.

It appears from the proof that, after this vessel met with her disasters in her voyages between Montreal and Falmouth, she was disrated and reported as such in the books of the American Lloyds. I have no doubt, however, from the proof that Mr. Higgle, the owner, was informed by the American consul at Cadiz that Benjamin G. Haines was the agent of the American Lloyds, and that Higgle in good faith supposed, from the indorsement made upon her certificate of classification by him, that she had been fully restored to her rating in the American Lloyds.

The proof, however, is conclusive to my mind that Mr. Haines was not the agent of the American Lloyds at Cadiz, and had no authority for or on behalf of that association to give this vessel a rating or classification, or to restore her to the classification from which she had been suspended; and while there is no proof going to show there was any intentional fraud on the part of the owner of this vessel in making the representation to the insurance company that she had been restored to her rate, yet there is no doubt in my mind that he would not have obtained this policy but



for the representations that this restoration had been made by an agent of the American Lloyds, and that the agents of the respondent acted upon the belief that she had been so restored, while the contrary was true. This undoubtedly is such a misstatement in regard to a material fact touching this risk as makes this contract void between the parties. "A positive representation as to a material fact is as essentially a part of the contract as a warranty, and must be substantially true; and, if untrue, releases the insurer." *Hazard v. Ins. Co.* 8 Pet. 578; *Sawyer v. Ins. Co.* 6 Gray, 221; *Curry v. Ins. Co.* 10 Pick. 535; *Wilber v. Ins. Co.* 10 Cush. 446; *Kimball v. Ins. Co.* 9 Allen, 540; *Campbell v. Ins. Co.* 98 Mass. 381.

It is a noticeable and somewhat suggestive fact in connection with this branch of the case that the testimony of neither the consul at Cadiz nor Haines has been taken by the libelants for the purpose of showing upon what authority they made this statement to Capt. Higgle to which he has testified. I think the fair presumption from the absence of their testimony is that it would not have benefited the libelants' case. I must, therefore, conclude—*First*, that the policy never attached to this freight list, by reason of the breach of the warranty of seaworthiness of the vessel; and, *second*, that the policy was issued by reason of such a misstatement as to the facts in regard to the classification and rating of the vessel as make it void against the respondents.

There was, however, no offer to return the premiums received for this policy by respondent until the hearing of the case, when the premium was paid into court for the benefit of respondent; and it is insisted on the part of libelants that by retaining the premium after notice of the loss respondent has estopped itself from claiming that the policy was void by reason of the breach of the implied warranty of seaworthiness, or by reason of having obtained the insurance upon a misstatement of facts. But the loss had occurred before respondent became aware of the fact of unseaworthiness at the time of the inception of the risk, or of the misrepresentation as to the facts of rating. If, before the loss occurred, respondent had become aware of the breach of warranty, or that the policy was obtained by misrepresentation, and still retained the premium, the doctrine of estoppel *in pais* might have been, perhaps, properly invoked, but no injury has come to libelants by the failure to return this premium since the loss accrued, nor have they been induced to do any act which they would not have done if the premium had been returned or offered to them; and I have no doubt that it

having now been paid into court for the libelants, this objection will not avail the libelants.

The order will be that the money paid into court be paid to the libelants, and the libel dismissed, with costs against libelants.

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IRON CITY NAT. BANK OF PITTSBURGH v. SIEMENS-ANDERSON  
STEEL Co.

(Circuit Court, W. D. Pennsylvania. April 26, 1882.)

1. EXECUTION--STATUTE CONSTRUED.

The act of the Pennsylvania legislature of April 7, 1870, gave a new remedy against corporations in addition to the provisions of the act of 1836, "and in lieu of the provisions or proceedings by sequestration" under the prior acts.

2. SAME--ON CORPORATIONS.

The sole purpose of the act of 1870 was to supersede the remedy by sequestration, and substitute therefor the levy and sale by *ieri facias* of the property, franchises, and rights of the corporation.

3. EXECUTION SALE.

The real property of a private trading corporation is held for strictly private ends, and should be sold agreeably to the provisions of the act of 1836, "in a manner provided in other cases for the sale of land on execution."

*Sur* petition on behalf of mechanic's-lien creditors.

D. T. Watson, for plaintiff.

J. H. Miller and John M. Kennedy, for mechanic's-lien creditors.

ACHESON, D. J. It is very clear to me that the act of April 7, 1870, (Purd. 291,) did not repeal or affect the provisions of the seventy-second section of the act of sixteenth of June, 1836, "relating to executions." The new remedy thereby given against corporations is expressly declared to be "in addition to" the provisions of said section, "and in lieu of the provisions or proceedings by sequestration" under the act of 1836. The sole purpose of the act of 1870, in my judgment, was to supersede the remedy by sequestration, and substitute therefor the levy and sale by *ieri facias* of the property, franchises, and rights of the corporation. Such, in my apprehension, was the construction given to the act of 1870 by the supreme court of the state in *Philadelphia & Baltimore Central R. Co.'s Appeal*, 70 Pa. St. 355, and *Bayard's Appeal*, 72 Pa. St. 453.

Under the act of 1836, after the remedies provided by the seventy-second section were exhausted, the way was open to sequestration, agreeably to the seventy-third, seventy-fourth, and seventy-fifth sections. 70 Pa. St. 356. But under the act of 1870 the corporate prop-

erty, franchises, and rights, which were formerly reached by sequestration, are sold out and out, and the proceeds divided among all the creditors, as in case of insolvency.

When carefully examined, *Hopkins & Johnson's Appeal*, 90 Pa. St. 69, will be found, I think, to be in substantial harmony with the foregoing views. I do not think the court there intended to intimate that the seventy-second section of the act of 1836 is not in full force. By the express provisions of the act of 1870, "lands held in fee" are excepted out of the sale thereby authorized, and such lands "shall be proceeded against and sold in the manner provided in cases for the sale of real estate." The plain meaning is that real estate of a corporation which before the act of 1870 was subject to levy and sale, shall remain liable to be taken in execution and sold as previously. This view is entirely consistent with *Longstreth v. Philadelphia & R. R. Co.* 11 Weekly Notes Cas. 309, which merely decides that the act of 1870 "did not intend to subject the property of corporations, before exempt, to execution piecemeal." The levy there was upon lots of ground held by the railroad company for public uses, viz., freight purposes, and not the subject of levy prior to the act of 1870. *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27. The principle of the decision is that the franchises of a railroad company, including its real estate necessary to the proper exercise of its public duties, must be levied on under the act of 1870 and sold as an entirety.

But the Siemens-Anderson Steel Company is a private trading corporation, and its real estate is not held for public purposes, but for strictly private ends. Confessedly, its real estate levied on here is held in fee. It is to be sold, therefore, (agreeably to the seventy-second section of the act of 1836,) "in a manner provided in other cases for the sale of land upon execution."

I am of opinion that it would be improper for the marshal to sell the franchises of the defendant corporation, and all its real and personal property levied on, as an entirety. I am further of opinion that in selling the defendant's real estate the marshal should follow the established rule that different parcels of land should be sold separately. As at present advised, I think the real estate in the Fourteenth ward and divided by Second avenue, should be sold as two distinct parcels. Upon this latter point, however, I will hear the counsel further, if it is desired, upon an application to modify the order about to be made.

And now, April 26, 1882, it is ordered that the marshal sell the real estate and other property and franchises of the defendant in accordance with the views expressed in the foregoing opinion.

## AULTMAN v. MORSE.

(Circuit Court, W. D. Missouri, W. D. November term, 1882.)

## 1. CONTRACT OF SALE—ACCEPTANCE.

Where a contract of sale of machinery provided that notice should be given of any defect in the machinery within five days, a failure to give such notice will entitle the plaintiff to a verdict for the value thereof, but such notice may be waived.

## 2. SAME—VALUE OF PROPERTY.

The law presumes the amount agreed upon by the parties is the true value of the property sold, and it is for the defendant to show that it is not.

*Phelps & Brown*, for plaintiff.

*Thompson & Cravens*, for defendant.

KREKEL, D. J., (*charging jury*.) The dispute before you has grown out of the sale of a steam thresher and attachments sold by Aultman & Co. to Morse, the defendant, for \$1,660. To secure this amount the mortgage in evidence was given. By it the machinery sold by Aultman & Co., as well as the cattle about which testimony has been given, were conveyed. The machinery has been sold by Aultman & Co. under the provisions of the mortgage. When Aultman & Co. demanded the cattle conveyed by the mortgage, Morse refused to deliver them up, and Aultman sued out his writ of replevin to obtain possession of the cattle. Thereupon Morse gave bond, and thus retained the possession of the cattle. He (Morse) now comes and defends that replevin suit, and says that the machinery sold him was not such as it was warranted to be, and that he ought not to pay for it, and that he has already paid more than the machinery is worth. The written agreement under which the machinery was sold contains a provision that it must be tried within five days, and if found faulty notice thereof must be given within the five days to the company and the local agent from whom the machinery was bought, otherwise it shall be assumed that the purchaser has accepted the machinery in satisfaction of the contract, and shall thereafter have no claim on the seller for damages. The company, Aultman & Co., have their manufactory or place of business in Ohio. The defendant, Morse, lives in Missouri. The time for trying machinery of the kind sold and the notices to be given may appear to you to be short, yet the parties have so made the contract, and they must stand by it. You are instructed, therefore, that plaintiff is entitled to a verdict in his favor if notice of defect in the machinery sold was not given within five days, as provided in the contract, and you should find the prop-

erty in controversy to be the property of plaintiff, finding the value thereof under the testimony, and specifying the same in your verdict.

The conditions of the contract spoken of are conditions favoring the plaintiff, and he may waive the same verbally by acts or in writing. If you shall find from the testimony that the company received notice or waived the notice provided for in the contract, then your inquiry will be, what was the machinery such as was sold worth, and was it as good as machinery of the kind, ordinarily, in considering the aims to which such machinery is put? The law presumes the amount agreed on by the parties is the true value of the property sold, and it is for defendant to show that it is not. For the purpose of determining the value of the property you will carefully examine the whole of the evidence, the length of time the defendants used the machinery, and whether or not such continued use of the machinery was induced by the acts of plaintiff's agent. In order that you may know the nature of your verdict and finding, I hand you for your use the following instructions:

In case the jury finds the issues for plaintiff, they will find the value of the property taken by plaintiff from defendant and specify the amount in their verdict. If the jury find the issues for the defendant, they will first find the value of the machinery sold by plaintiff to the defendant, and if the value thereof is greater than the payments made thereon by the defendants, allow the plaintiff the difference and specify that difference in their verdict. If the jury find from the evidence that the amount paid by defendant is as great or greater than the value of the machinery, they will find the issues for the defendant.

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BRISWALTER v. LONG.

(Circuit Court, D. California. February 14, 1881.)

**BANKRUPTCY—ADJUDICATION.**

The district court has authority, under the bankrupt act, to adjudge a party a bankrupt, both as an individual and as the surviving partner of a firm.

*Smith, Glassell & Chapman*, for plaintiff.

*L. D. Latimer*, for defendant.

SAWYER, C. J. This is a demurrer to the answer. There is a defect in the answer which ought to be corrected,—I suppose a clerical error,—describing the proceedings to have been in "this court," being

the superior court of Los Angeles county, instead of in the district court of the United States for the district of California, as it should have been. With that correction I think the answer is good.

The point is whether the district court has authority under the bankrupt act to adjudge a person individually, and at the same time as surviving partner of a firm, to be a bankrupt. Undoubtedly, where the partnership is dissolved by the death of one of the partners, the surviving partner is entitled to wind up the partnership affairs. This is so at common law, and expressly so under the Civil Code. Nobody else could wind up the partnership affairs and collect the moneys due to the firm so well as he; therefore, the administration of the partnership assets is left in the hands of the surviving partner.

In this case Mr. Temple was adjudged a bankrupt on his own petition. He filed his petition both individually and as surviving partner of the firm of Temple & Workman, and was adjudged a bankrupt in his individual capacity and as surviving partner of that firm; the assignment was duly made of his individual property, and of the assets of the partnership, and the assets were afterwards administered in the court of bankruptcy. The question was raised in the district court by the plaintiff that no authority could be found for Temple to be adjudged a bankrupt as a surviving partner. The court, however, held otherwise, and adjudged accordingly. I think the court had authority to make that adjudication. Otherwise, I do not see how the affairs of the firm could be wound up, for nobody else had authority in the matter but Mr. Temple, as surviving partner. It was his business to close up the affairs of the firm, and pay off the indebtedness so far as he could. But he became bankrupt as an individual, and as a member of the partnership, and the district court took charge of his affairs. After becoming bankrupt, he could no longer act in settling up the partnership affairs. If the district court could not settle his affairs as surviving partner, as well as his individual matters, nobody else could.

The administrator had nothing to do with the matter except to receive the share of the surplus, if any there should be, after settlement of the partnership affairs belonging to the deceased partner. The powers of the court in bankruptcy upon an adjudication of bankruptcy are, necessarily, called into action. The court accordingly takes charge of the partnership assets, settles up the matters, and applies the partnership funds, so far as is necessary, to the partnership debts, and the portion of the surplus, if any, belonging to Temple goes to his personal assets, and are distributed to his individual

creditors, and the portion of the surplus belonging to the estate of the deceased partner is paid over to his administrator. If Temple could not longer act in the settlement, then nobody else was empowered to take charge of it but the district court. The district court, therefore, had jurisdiction to adjudge Temple bankrupt as surviving partner, as well as in his individual capacity, and had power to take charge and control of the partnership property; and having adjudged him a bankrupt in due form that judgment is valid. That being so, it disposes of the case, and the demurrer must be overruled upon the technical amendment being made to which I have called attention.

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**MOLINE WAGON Co. v. RUMMELL and others.\***

*In re* HUISKAMP BROS., Interpleaders.

(Circuit Court, W. D. Missouri, W. D. October Term, 1882.)

**1. PARTNERSHIP—ASSETS—RIGHTS OF CREDITORS.**

All the assets of a partnership, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership, and an individual partner can neither mortgage the property of the firm nor deliver possession thereof, to pay an individual debt.

**2. SAME—DISSOLUTION—DIVISION OF PROPERTY.**

Where a partnership is dissolved, and the property of the firm has been divided and was held separately by each partner as individual property and not as property of the firm, each partner may convey, mortgage, or deliver possession of his individual share; but, if no legal dissolution has taken place, such property remains partnership property as to creditors of the firm who knew nothing of the division and who extended credit to the firm.

**3. DEBTOR AND CREDITOR—PREFERENCE.**

A debtor has a right under the limitations of the state laws to pay, secure, or prefer one creditor over another, and to make a mortgage to secure an individual debt and out of his individual property; but the transaction must be in good faith, and not done to defraud, hinder, or delay his creditors.

**4. SAME—PREFERENCE IN FRAUD OF CREDITORS.**

The fact that the intention of the debtor, in making the mortgage to secure a creditor, was fraudulent, is not of itself sufficient to make the mortgage fraudulent as to such creditor, if such creditor in no way participated in the fraud, or aided or assisted in the illegal act.

**5. SAME—DEALINGS WITH DEBTOR—GOOD FAITH ESSENTIAL.**

In dealing with a debtor under such circumstances, and in taking possession of a debtor's property, a creditor must exercise the utmost good faith, and his failure to do so deprives him of any right under the mortgage.

*James Hagerman and Tannehill & Fee*, for interpleaders.

*James J. Parks and Gage & Ladd*, for plaintiffs.

\*Reversed. See 7 Sup. Ct. Rep. 899.

KREKEL, D. J., (*charging jury.*) The Moline Wagon Company, an Illinois corporation, sued Rummell and Cutler, in their firm name of Rummell & Son, in the circuit court of Putnam county, Missouri, on four notes and an account, and in aid of their suit obtained an attachment. Under this attachment the property in controversy, a stock of merchandise, was seized and sold, and the proceeds of this sale now in court is the matter in dispute. In the attachment suit between the Moline Wagon Company and Rummell and Cutler, Rummell filed what in law is termed a plea in abatement; that is, he denied the facts alleged in the affidavit made by the company to obtain the attachment. The law allows attachments to issue and property to be seized in cases only where debtors have or are about to deal with their property in an illegal way. The affidavit made by the Moline Wagon Company at the time they sued out their attachment, in appropriate legal language, charged that Rummell and Cutler had conveyed or were about fraudulently to convey, their property so as to hinder and delay their creditors in the collection of their debts. This charge Rummell denied. A trial which was had on this issue resulted in the sustaining of the attachment; that is, the charges made in the affidavit by the Moline Wagon Company that Rummell had fraudulently conveyed, or was about fraudulently to convey, the property in controversy to hinder and delay creditors, were true. Cutler, the defendant with Rummell in the attachment suit, did not appear, and thereby confessed the charges of fraud.

While this controversy was going on, Huiskamp Bros., a firm in Keokuk, Iowa, filed their interplea in the case, alleging that the property in controversy was theirs, claiming title thereto in two ways—*First*, by the mortgage which has been read in evidence; and, *next*, by obtaining actual possession of the property in satisfaction of their claim. The question, therefore, is, shall the Moline Wagon Company hold the property under the attachment, or shall it be adjudged the property of Huiskamp Bros. And this is the issue you are to determine under the evidence and the law as given you by the court. Both the Moline Wagon Company and Huiskamp Bros. claim the property as property of Rummell and Cutler; the Huiskamp Bros., in one view they take of their case, asserting that it was the individual property of Rummell.

It is an undisputed fact that up to January, 1878, Rummell and Cutler, under the name of Rummell & Son, carried on partnership business in which the partners were equally interested. It is claimed by Huiskamp Bros. that in January, 1878, a dissolution of the partner-



ship of Rummell & Son took place, and that thereafter each partner, under the division of the property made, held property in their individual rights only. It is true, and you are instructed, that if you shall find from the testimony that a division of property between the partners took place, and that thereafter the property was held separated by each partner as individual property and *not as the property of the firm*, then each partner could deal with his own property as he chose; could convey or mortgage the same and deliver possession thereof to any one, without creditors of the firm having a right to complain. But if no legal dissolution of the partnership took place in January, 1878, or since, and the partners continued to hold the property in controversy as partnership property, bought, sold, and advertised it as firm property, such property remained partnership property so far as creditors are concerned who knew nothing of the division and who trusted the firm.

Under the view of the case last presented, you will have to determine whether there was a dissolution of the partnership. As already stated, it is an undisputed fact that up to January, 1878, a partnership between Rummell and Cutler did exist; that that partnership dealt in general merchandise, including farming implements, wagons, etc.; and that dealings prior to that time were had between the Moline Wagon Company and the firm of Rummell & Son. The Moline Wagon Company had a right to presume that the persons once composing a firm, and who continue doing business under the firm name, are still partners, and that the partnership continued to exist until notice of a dissolution was given. No agreement or understanding between the partners, no division of the property of the firm, can relieve either the firm or the partners of their legal liability as to creditors who extend credit to the firm; nor are creditors who extend credit to the firm bound to regard public rumors, even if they heard them, if the partners continue the partnership name and avail themselves of the partnership credit. You are therefore instructed that the partnership between Rummell and Cutler, existing in 1878, continued to exist up to the time of the creation of the debts sued on by the Moline Wagon Company, unless public notice of the dissolution of the partnership was given, or actual notice of such dissolution was brought home to the Moline Wagon Company. If, under this view of the law, you shall find from the evidence that plaintiff, the Moline Wagon Company, gave credit to the firm of Rummell & Son, composed of Rummell and Cutler, then the firm and each of the partners are liable for the debt thus contracted. All of the assets of the

partnership, both merchandise, notes, and accounts, as well as all wages and property of the partnership, which Cutler may have handled in his division of the partnership, as well as all notes and accounts which Cutler may have taken, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership. If you shall find that the partnership once existing between Rummell and Cutler had not been dissolved, and the property in dispute to be partnership property then Rummell could not take such partnership property and pay an individual debt with it, such as Huiskamp Bros. claim to have, and the mortgage read in evidence given them is void as against creditors of the firm.

We now come to the inquiry as to the good faith of the parties to the mortgage in making it. This becomes important in case you shall find from the evidence that the debt of the Moline Wagon Company was a partnership debt; for in that case the Moline Wagon Company, as creditors of both Rummell and Cutler, had a right to inquire how Rummell dealt with his individual as well as partnership property. Under the law, partnership property is the first or original fund out of which partnership debts are paid; but the individual property of partners is also liable for the debts of the partnership; so that Rummell must honestly deal with either. A debtor in Missouri has a right, under the limitations of its laws, to pay, secure, or prefer one creditor over another, and in honestly doing so he commits no fraud on his creditors. Rummell had a right to prefer Huiskamp, and make the mortgage to secure an individual debt, and out of his individual property; but the transaction must be an honest one, and not done to defraud, hinder, or delay his creditors. So far as the intent to defraud, hinder, and delay creditors on the part of Rummell is concerned, a trial of that issue has been had in this court, with the result brought to your notice by reading from the records. The intention of Rummell in making the mortgage to Huiskamp Bros. was found to have been fraudulent, but this of itself is not sufficient to make the mortgage fraudulent as to Huiskamp Bros. Huiskamp Bros. may have known when they accepted the mortgage from Rummell that he intended to defraud, hinder, and delay his creditors by it; yet, if they in no way participated in the fraud of Rummell, did no act to aid or assist him in the illegal act, and intended to secure their debt only, the mortgage, as to them, is valid, and they are entitled to the benefit of the same. But, on the other hand, if, aside from the securing of their own debt, Huiskamp Bros., by and through the mortgage, undertook to aid and assist

Rummell in his fraudulent purposes to hinder and delay the Moline Wagon Company, or any other creditor, in the collection of their debt, in such case the mortgage is void, and they can claim nothing under it as against creditors. This is the important question in the case, and you should carefully examine the whole of the testimony bearing upon this point.

Attention should be given to dates of the various occurrences, and in the presence of the attorneys, subject to their correction, and to aid you I recall some of them. The two notes of the Moline Wagon Company first becoming due, amounting to \$3,328, became due on the first day of January, 1880. The mortgage is made on the day these notes became due, but is dated back to the twenty-fourth of December, 1879. Cutler, on the twenty-seventh of December, 1879, mortgaged his property. The value of the property mortgaged as compared with the debt to be secured thereby, the release of the notes and accounts and delivery of them by Huiskamp Bros. to Rummell, the provisions of the mortgage for a public sale, and the taking of possession by Huiskamp Bros. and selling at retail, should be called to mind with the rest of the testimony, and the whole judged of under the obligation of caution induced by the judgment which determined that Rummell had acted fraudulently in making the mortgage. In dealing with Rummell under these circumstances Huiskamp Bros. must exercise the utmost good faith, and their failing to do so deprives them of any right under the mortgage. What is said of the mortgage applies with equal force to the taking of possession of the goods. Huiskamp Bros. had a right to take possession of the goods in controversy to satisfy their claim, if they were the individual property of Rummell and Rummell consented thereto; but the taking of such possession must have been in good faith and for the purpose of satisfying their debt, and not to aid Rummell in carrying out his fraudulent purposes.

As already stated, if, under the facts of the case, and the law applicable thereto, as given you, you find the goods to have been the goods of the partnership, and not the individual property of Rummell, he could neither mortgage them, nor deliver possession of them to pay an individual debt. If, under the testimony and the law as given you by the court, you find the issue for the interpleaders, you will say so in your verdict. If, on the other hand, you find the issue against the interpleaders, and that the property is subject to the attachment, you will state that in your verdict.

## MARTIN and others v. HAUSMAN and others.

(Circuit Court, W. D. Missouri, W. D. October Term, 1882.)

## 1. ASSIGNMENT FOR BENEFIT OF CREDITORS.

Under the laws of Missouri every voluntary assignment by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims; but a mere deed of trust or mortgage for the security of certain debts therein named is not an assignment, and will only inure to the benefit of such creditors as are secured thereby.

## 2. SAME—ASSIGNMENT AND SECURITY DISTINGUISHED.

An assignment differs from a mere security for a debt in passing both the legal and equitable title to the property to the assignee *absolutely*, beyond the control of the assignor, to be sold for the payment of debts, leaving no equity of redemption; and as the deed in this case has that effect, it must be considered an assignment for the benefit of *all* the creditors, and not a mere deed in trust to secure the debtors therein named.

*Betsford & Williams* and *Henry Wellman*, for plaintiffs.

*Tichenor, Warner & Dean*, for defendants.

KREKEL, D. J. This action was commenced in the circuit court of Jackson county, Missouri, and removed by the complainants to this court. The bill alleges that plaintiffs are creditors of Stiefel & Ney; that the latter were engaged in business at Kansas City, Missouri, prior to August 2, 1882, as wholesale dealers in liquors and cigars; and that on the date above set forth they executed to the defendant Hausman a certain deed of trust which is called "a deed of assignment," and is in the following language:

"This deed, made and entered into this first day of August, 1881, by and between Edward Stiefel, Solomon Stiefel, and Isaac Ney, constituting the firm of Stiefel & Ney, of Kansas City, Missouri, party of the first part, and Gustave Hausman, party of the second part, and the Anheuser-Busch Brewing Association, and the Bank of Kansas City, Missouri, parties of the third part, witnesseth, that the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents sell, assign, transfer, and set over to the said party of the second part the following-described personal property, in the county of Jackson and state of Missouri, to-wit: The entire stock of liquors, cigars, and tobacco in the store of the grantors herein, at Nos. 602 and 604 Delaware street, in Kansas City, together with the fixtures, safe, desks, chairs, furniture, stoves, horses, wagons, and each and every thing now used in and about the store aforesaid where the said Stiefel & Ney have been carrying on the business of wholesale liquor dealers, intending hereby to embrace the entire stock of said business, with everything used in connection

therewith: To have and to hold the same, with the appurtenances, to the said party of the second part, in trust, however, for the following purposes: Whereas, the said Stiefel & Ney, as such wholesale liquor dealers, have bought goods from time to time from the Anheuser-Busch Brewing Company, and are now indebted to them in the sum of thirty-two thousand seven hundred and twenty-seven 85-100 dollars, (\$32,727.85,) and are indebted to the Bank of Kansas City in the sum of twelve thousand eight hundred and forty-one dollars, (\$12,841,) and which consists of two notes, each for the sum of \$5,000, and due, one on August 8, 1881, and the other on August 11, 1881; and the balance of said indebtedness consists of an overdraft of \$2,841 due on demand; the said indebtedness to said Anheuser-Busch Brewing Company consists of 20 notes and the balance in open account: Now, to secure the payment of said indebtedness to said Anheuser-Busch Brewing Company and to said Bank of Kansas City, this deed is made, and the property herein assigned, transferred, and sold is this day delivered into possession of the said party of the second part, and he, the said party of the second part, shall hold the same for the purpose herein provided. The said party of the second part shall keep the said property fully insured, and shall proceed at once to realize from said property at either public or private sale, for cash, keeping an accurate account of all goods so sold, and the amount realized therefrom, as well as all expenses incurred in and about taking care of and selling said property; and out of the proceeds of such sales he shall pay, first, the costs and expenses, and the balance shall be applied *pro rata* upon the said indebtedness, as it shall mature, until the whole shall be paid; and when such has been fully paid, then this deed shall be released at the cost of said parties of the first part. Said party of the second part shall not sell said goods at private sale for less than their market values, and if sold at public sale, 20 days' notice thereof shall first be given, by advertisement, in two of the daily papers published in Kansas City, Missouri, and within four months from this date, at either private or public sale, said property shall be disposed of, or so much thereof as may be necessary to pay off the said debts hereby secured, with interest and costs.

"Witness our hands and seals, the day and date written.

"EDWARD STIEFEL. [Seal.]

"SOLOMON STIEFEL. [Seal.]

"ISAAC NEY. [Seal.]"

This deed was acknowledged and recorded on the day of its execution in the office of the recorder of deeds of Jackson county, Missouri. It further appears from the recitals in the bill that Hausman immediately took possession of the stock in trade and other property conveyed to him by said deed, and that the value thereof was, at the date of the execution of the deed, \$75,000. It is alleged therein that said conveyance is an assignment for the benefit of all the creditors of said Stiefel & Ney, and that said Hausman has refused to recognize it as such an instrument, and failed to perform any of the stat-

utory duties imposed upon him as assignee in cases of assignment for the benefit of creditors. It is also stated in the bill that he has refused to recognize the rights of any of the other creditors of Stiefel & Ney, but that, after selling the property described in the deed, he has paid in full the indebtedness due to the Bank of Kansas City and the Anheuser-Busch Brewing Association; that after paying these two creditors in full there is still left the sum of \$10,000, which he retains for his costs, charges, and compensation as trustee; that said trustee has always, from the time of accepting said trust, denied the rights of any of the creditors of Stiefel & Ney, excepting the two named in the deed, to any benefit of said conveyance, or to receive any payment of their debts or claims, or any part thereof, from said trust property or the proceeds thereof, and has neglected and refused to execute said trust as required by the law relating to assignments, or to perform all or any of his duties as trustee thereunder; that he has refused to file an inventory, or to cause the goods and effects conveyed to him to be appraised, or to execute any bond for the faithful discharge of his duties as an assignee, or to fix the time and place for adjusting and allowing demands against the estate of said Stiefel & Ney, as insolvents under the assignment law, or to give any notice thereof, or to adjust and allow any demands against said estate, or to pay any such demands in proportion to the amount of each, or in any manner to execute or perform said trust as in cases of assignments.

It is further alleged that Hausman is insolvent, and has parted with all the property except said sum of \$10,000; and said Bank of Kansas City and said Anheuser-Busch Brewing Association refuse to account to the other creditors of Stiefel & Ney for the money they have received from said trustee, or any part thereof; that said Stiefel & Ney are indebted in large sums to creditors unknown to the complainants; and this action is commenced for the benefit of so many of said creditors as may join therein, as well as the complainants themselves. The prayer for relief is that the court declare said deed to be for the benefit of all the creditors of said Stiefel & Ney, in proportion to their respective claims; that Hausman be removed from his trust as trustee, and another trustee appointed, and that he be compelled to account for all the sums of money and property he received under said deed of trust, and he pay over and deliver the same to the trustee to be appointed; that the Bank of Kansas City and the Anheuser-Busch Brewing Association be compelled to account for all the money or property they have received from said Hausman, and

pay the same over to said new trustee, and that the same be distributed among the creditors of said Stiefel & Ney, according to their respective rights as in cases of assignments. To this bill defendants file separate demurrers, alleging that the bill shows no cause of action; that improper parties are joined; and that it is an attempt to resort to equity to collect a debt.

The main question to be determined is the character of the instrument by which Stiefel & Ney conveyed their stock in trade to Hausman; the plaintiffs claiming it to be an assignment, and as such coming within the provisions of the statute of Missouri providing that every voluntary assignment by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims; the defendants claiming it to be a deed of trust or mortgage for the security of the debts therein set out. At common law an insolvent debtor could prefer one creditor over another; make full or partial payments to one or more, leaving others unpaid. This right was recognized by the supreme court of Missouri long before the legislature undertook to regulate assignments. The right of making preferences is assumed in the first legislation of Missouri on the subject of assignments, which occurred in 1841. The act of February 15th of that year required the filing of inventories or schedules of the estate and effects assigned, with the clerk of the circuit court, within 30 days after the execution thereof, unless longer time was allowed by the judge of the court; made provisions for appraisements, and the giving of bond by the assignee. There are also provisions in the act giving the court control and jurisdiction over the assignee. The law as originally enacted, somewhat expanded, passed into the Revisions of 1845 and 1855. In the latter act the powers of the court over the assignee and the control of the property is enlarged, and a new section added (39) which is as follows:

"Every provision in any assignment hereafter made in this state, providing for the payment of one debt or liability in preference to another, shall be void; and all debts and liabilities within the provision of the assignment shall be paid *pro rata* from the assets thereof."

Questions arose as to whether this provision did not do away with all preferences in assignments, but the supreme court determined that they were still legal, and that the effect of this section was to do away with preferences among creditors named in the assignments who were to be paid *pro rata*. *Shapleigh v. Baird*, 26 Mo. 322. In

deciding this case Judge NAPTON, who delivered the opinion of the court, uses arguments which, when taken in connection with the legislation which followed, is not without significance. He says:

"Allowing partial assignments still to be valid, as they were previous to its enactment, the section (39) abolishes all provisions in such assignments which give preferences among the creditors selected, and requires the assignee to treat such provisions as nullities and distribute the effects *pro rata*. In cases of a general assignment of all the debtor's property to his creditors, which I presume is the usual and common form of such instruments, this section will accomplish everything that could be desired. It prevents all classification of creditors in such deeds; an evil much complained of, and doubtless within the mind of the legislature. But so long as partial assignments are permitted, and a debtor can transfer his property by such instruments to any portion of his creditors he desires, this section of the Revised Code of 1855 is totally ineffective to prevent preferences among creditors. The enactment may be always evaded by the selection of a single creditor, or any number of creditors sufficient to exhaust the effects assigned. Indeed, if the legislature wish to strike at the root of the evil they must go back to the old principle of the common law, which permits a debtor to prefer one creditor to another. Without, however, undertaking to suggest any views of our own as to the true policy which should prevail, and how far the legislature may with safety go to the abolition of this ancient principle, it is sufficient that the legislature has not yet, in our opinion, abolished the right of debtors to make assignments to a portion of their creditors."

Thus stood the law up to February 13, 1864, when a new section was enacted, which, somewhat amended, afterwards passed into the Revision of 1865, and reads as follows:

"Every assignment of lands, tenements, goods, chattels, effects, and credits made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims, and every such assignment shall be proven, or acknowledged and certified and recorded, in the same manner as is prescribed by law in cases wherein real estate is conveyed."

This section, carried into the Revision of 1879, is now the law of Missouri.

This new section was passed upon and construed by the supreme court of Missouri in the case of *Crow v. Beardsley*, 68 Mo. 435. Beardsley had executed a deed of trust to Kennan to secure him and other creditors named in the conveyance debts not then due. The deed contained the usual provision that if the debts were not paid at maturity the trustee was authorized to sell the property conveyed, and out of the proceeds pay the debts secured. Judge HENRY, delivering the opinion of the court, says:



"Both appellant's and respondent's counsel seem to labor under the impression that the first section of the act in relation to voluntary assignments avoids assignments which give a preference among creditors. We are not inclined to place that construction upon the section. It provides that every voluntary assignment, etc., made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor in proportion to their respective claims; in other words, whether one or more of the creditors be named it shall nevertheless inure to the benefit of all. [Adopting the construction given to the old thirty-ninth section in the statutes of 1855, the court proceeds to say:] Section 1 of the act now in force has a wider scope, and was designed to prevent any preference of creditors whatever by assignments. Nothing in the section indicates that an assignment preferring a portion of the creditors shall be void; but the most reasonable construction of the section is that the assignment shall stand, and shall inure to the benefit of all, as well those not named as those named in the assignment."

In considering the question whether the deed from Beardsley to Kennan was an assignment, or a deed of trust to secure creditors, the court says: "An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment; citing 1 Burrill, Assignm. 12." The conclusion in the case before the court is arrived at that the deed of trust under consideration is not an assignment. Assuming that under the legislation of Missouri, and the construction given to it by the supreme court of the state, failing debtors may still make preferences among their creditors, the question remains, does the instrument under consideration fall within the provisions of the assignment law of Missouri, and inure to the benefit of all the creditors of Stiefel & Ney, whether named or not?

In Burrill, Assignm., it is said:

"An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment. It does not create a lien in favor of creditors upon property which in equity is still regarded as the assignor's, but it passes both the legal and the equitable title to the property absolutely beyond the control of the assignor. There remains, therefore, no equity of redemption in the property, and the trust which results to the assignor in the unemployed balance does not indicate such an equity."

Among the authorities cited is the case of *State v. Benoit*, 37 Mo. 500. The conveyance in that case was to trustees, who were to take possession immediately and sell at private or public sale, and pay the creditors therein named. HOLMES, J., speaking for the court, says:

"There was some discussion as to whether the instrument in question here was to be considered as a deed of trust in the nature of a mortgage security for a debt, or a partial assignment for the benefit of creditors. It does not

purport to be a security for a debt, with power to sell if the debt be not paid when due. It conveys the property absolutely to trustees, to be sold for the payment of the debts named and preferred in it. It is clearly a partial assignment for the benefit of creditors, and not a mortgage security. Such instruments have always been treated as assignments." 20 Mo. 461; 1 FED. REP. 78.

Looking at the character of the instrument under consideration, and applying to it the distinctions made in instruments of that class by the authorities, it would seem that it must be declared an assignment within the laws of Missouri. The seeming incongruity of allowing preferences and expounding instruments, making them so as to defeat their object, is the result of legislation. At common law, as already stated, a debtor could prefer one or more creditors in whole or in part. The legislature of Missouri, in the act of 1855, limited that right, and, according to the construction given to that act by the supreme court of the state, provided that among those preferred there should be no difference. When the inconsistency of thus discriminating between creditors was pointed out by Judge NAPTON in 1858, the law was amended in 1864 by a new section providing that every assignment in trust for creditors shall be for the benefit of all the creditors of the assignor. Was this intended to prohibit a failing debtor from giving preferences at all? I am inclined to think so, but distinguish between a debtor who, though insolvent, yet hopes to tide over his financial difficulties by securing some of his creditors, while others go unsecured. The instruments by which debts are thus secured do not fall within the provisions of the assignment law, while such as dispose of the whole of the business and the property of the assignor, thereby declaring insolvency, are held to fall within its provisions. A careful examination of the long line of Missouri decisions has led to the conclusion arrived at. This conclusion is also in keeping with the authorities of many of the states, and especially in line with federal legislation and the decisions of its courts thereon. To reiterate, a debtor in Missouri, under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them, but he cannot do it by an instrument conveying the whole of his property to pay one or more creditors. Instruments of the latter class will be construed as falling within the assignment laws, and as for the benefit of all creditors, whether named in the instrument or not. Recognizing as I do both the right and propriety of the courts of a state to construe its laws, an earnest effort has been made to con-

form to the legislation of the state, and the construction given to it, in the conclusion arrived at.

The demurrers will be overruled.

Judge McCraby concurs.

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ROBERTS and others v. WALLLEY.

(Circuit Court, N. D. New York. 1882.)

1. PATENTS FOR INVENTIONS—EXAMINATION OF WITNESS.

The complainant in a patent case, where the infringement and the validity of the patent are both denied, as part of the preliminary proof, cannot compel the defendant to disclose the names of confidential customers to whom he has furnished articles alleged to be covered by the patent.

2. SAME—CONTEMPT OF WITNESS.

The examiner in a patent case has no power to rule upon the admissibility of evidence, and defendant, as a witness before him, has the right, upon a doubtful question, to take the opinion of the court; and where he acts under the advice of counsel, and apparently in good faith, his refusal to answer should not be punished as for a contempt, even though he acted mistakenly.

*Frederic G. Fincke*, for motion.

*Hamilton Ward*, opposed.

COXE, D. J. This is a motion to punish defendant for contempt in refusing, under the advice of counsel, to answer certain questions in proceedings before the examiner. The action is brought for the infringement of a patent for oil-well torpedoes. The complainants called the defendant as their witness. He testified that he was engaged in the business of torpedoing oil wells, many of them being located in this state; that he owned the patents for the processes used by him, etc. He was then asked:

*Question.* Prior to January 1st of this year, how many torpedoes do you suppose you put in oil wells in this state?

*Answer.* Well, sir, I have no idea.

The foregoing question was objected to on the ground that the bill charges but one violation.

*Question.* Tell me what person or persons you have put in torpedoes for in oil wells in this state prior to January 1st of this year?

Objected to.

*Defendant's Counsel.* You need not answer. We cannot go on a fishing excursion here for other cases.

*Answer.* Well, I don't want to answer that question.

*Question.* Do you refuse to answer?

*Answer.* Well, shall I refuse, Mr. Ward?

*Defendant's Counsel.* I should refuse if I were in your place.

*Question.* Tell me the name of one person or firm for whom you put in nitro-glycerine torpedoes in an oil well in the town of Bolivar, in this state, prior to January 1st of this year?

Objected as before, and as incompetent.

*Witness.* I refuse to answer the question.

Subsequently he stated that the reason for this refusal was that the parties referred to were his customers, and it would be a breach of confidence to disclose their names. He now insists that complainants do not wish the information for the purposes of this suit, but to obtain evidence in other suits pending and to be hereafter commenced.

The question presented is simply this:—Can the complainant in a patent suit, where the infringement and the validity of the patent are both denied, as part of his preliminary proof, compel the defendant to disclose the names of confidential customers to whom he has furnished articles alleged to be covered by the patent? The complainants do not submit a brief, and the court is referred to no authority bearing directly upon the question. It appears, however, after a somewhat careful examination, that the books contain many cases where similar questions have been asked in proceedings before the master, and but few in which such proof has been allowed before the examiner, the patent and the infringement both being in dispute.

The authority which bears the closest resemblance to the case at bar is *Turrell v. Spaeth*, 2 Bann. & Ard. 185. The court says:

"The complainant seeks to establish his *prima facie* case of infringement by putting one of the defendants on the stand as a witness, and proving by him what the defendants have done. He calls his attention to Exhibit No. 1, and asks whether he has made skates substantially like that. The witness admits that he has, and that the defendants have a contract to furnish such skates to the firm of Peck & Snyder. He is then requested to produce the contract, which he properly declines to do, alleging as a reason that he does not wish to disclose to rivals the price which they (his customers) were to receive, or the number to be manufactured; but he again admits that it was a contract to deliver skates very nearly like Exhibit No. 1 of complainant. The sole pertinent inquiry now is the fact of the infringement, and that fact will not be made any more evident by producing the contract, than it has been, by the admissions of the defendants. The extent of the infringement is a different question, and will only arise, if at all, upon a reference for an account, after a decree for the complainant."

The witness was then asked to produce his books, which he declined to do, on the ground that he did not wish to disclose his business to the complainant. The court made an order requiring the witness to answer a certain question, and intimated that if the books would throw light on this question a subsequent application might be made on notice for their production.

In *Storm v. U. S.* 94 U. S. 76, it was held that the court will not permit questions to be propounded to a witness merely to ascertain the names of persons whom a party may desire to call to disprove the case of his adversary. See, also, as bearing on this question, *Burnett v. Phalon*, 19 How. Pr. 530; *Greenl. Ev.* (13th Ed.), 509, 510, 410; *Lord Melville's Case*, 29 How. State Tr. 376; *Rex v. Woburn*, 10 East, 395; *Fenn v. Granger*, 3 Camp. 177; *White v. Everest*, 1 Vern. 181; *Brady v. Atlantic Works*, 15 O. G. 965.

It follows that, although the examination of the defendant was proper within certain limits, it was not proper to the extent insisted upon by the complainants. The necessary proof of infringement could, it seems, be obtained without requiring witness to disclose the names of all his customers in this state as required by the second question above quoted. This knowledge might be of advantage to complainants in other prosecutions, but how it could materially aid the court upon the question of infringement it is not easy to discover.

If the patent is sustained and the device of the defendant determined to be an infringement, his previous testimony that he had used his torpedoes in great numbers in this state is surely sufficient evidence of use to sustain an interlocutory decree. While it would seem that the complainants are not entitled to pursue this line of examination *ad libitum*, they are entitled to sufficient evidence to enable them to present to the court clearly and intelligently a complete description of the defendant's torpedo, the manner of its use, and the effect produced by its explosion. It follows, therefore, that the question calling for the name of *one* person or firm should have been answered. Should the complainants desire again to examine the witness, he should be required to answer as suggested. It is very clear from these views that the motion to punish for contempt must be denied. The examiner had no power to rule on the admissibility of the evidence, and the defendant had the right upon a question, which, to say the least, was not free from doubt, to take the opinion of the court. Had he answered, the mischief which he seeks to avoid would have been accomplished, and he would have been left remediless. He acted under the advice of counsel, apparently in good

faith, and, even though he acted mistakenly, it is not a case where he should be punished. *In re Judson*, 3 Blatchf. 148; *Smith v. Stage Co.* 18 Abb. 419; *Hilliker v. Hathorne*, 5 Bosw. 710; *Weeks v. Smith*, 3 Abb. Pr. 211.

The motion is denied.

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GOTTFRIED v. MOERLEIN and eighteen other cases.

(Circuit Court, S. D. Ohio. November 22, 1882.)

PATENT EXPIRED AFTER SUIT BROUGHT—RELIEF GRANTED.

The mere fact of the patent expiring after suit brought, and before final hearing, will not defeat the jurisdiction. A court of equity will administer any relief it finds necessary.

In Equity.

*Banning & Banning*, for complainant.

*Parkinson & Parkinson*, for defendants.

BAXTER, C. J. The foregoing causes came on to be heard upon the motion of defendants to dismiss each of said causes, for the reason that it appearing upon the face of the pleadings and record that the patent sued upon has expired before the submission of the cause for an injunction or any equitable relief, and the pleadings showing no cause for equitable relief other than for the purpose of an injunction, there is no ground for the intervention of a court of equity, and that no such equitable relief can be granted as to enable this court, as a court of equity, to acquire jurisdiction for the purpose of any relief whatever; and, said motion having been argued by counsel for defendants, the court refusing to hear arguments for complainant, and the court, being now fully advised in the premises, doth order that said motion be and the same is hereby overruled.

NOTE. Judge BAXTER, in disposing of the above motion, said, in substance, that at the time the suit was brought the patent was still in force, and it was therefore properly brought on the equity side of the court; that the mere fact of the patent expiring before final hearing would not defeat the jurisdiction; and that a court of equity would administer any relief it found necessary. Judge GRESHAM, District of Indiana, ruled the same way in *Gottfried v. Crescent Brewing Company*, 13 FED. REP. 479, the point being there made, in opposition to the entry of a decree, "that the patent having expired before the submission of the cause, the court had no jurisdiction as a court of equity to award an injunction or account, or other relief."

## FINNEY and others v. GRAND TRUNK RY. Co.

*(District Court, N. D. Illinois. 1882)*

## 1. SHIPPING—DISCHARGE OF CARGO—DEMURRAGE.

Where a cargo of corn was unloaded as soon as practicable at defendant's elevator, it being the only elevator at the port of arrival, defendant is not liable for demurrage, notwithstanding there was a delay in unloading the cargo arising from the fact that other vessels had arrived before the libellant's vessel, and preference was given to them in unloading.

## 2. SAME—CHARTER—PRESUMPTIONS.

A party making a charter of his vessel must be presumed to know the course of business at the port of destination, and that his vessel must wait until vessels which arrived before his were unloaded.

## 3. SAME.

Where there was no stipulation in the charter-party that the vessel should be unloaded within any special time, nor for quick dispatch, her owner cannot recover for delay caused by awaiting her turn for unloading.

*W. H. Condon*, for libellant.

*Jhas. E. Kremer*, for respondent.

BLODGETT, D. J. This is a libel for damages by the owners of the schooner *George C. Finney*, by reason of alleged unreasonable delay in the discharge of the cargo of the schooner at *Goderich*. The undisputed facts are these: That the schooner was chartered in the city of *Chicago*, on *October 18, 1880*, to carry a cargo of corn to *Goderich, Canada*. She took on her cargo, and sailed the day after she was chartered, which was *October 19th*. Her bill of lading showed a shipment of *20,055 bushels of corn* at the port of *Chicago*, to be transported to *Goderich*, and there delivered "for account of *G. P. Comstock & Co.*," "in care of the *Grand Trunk Railway Company*." No promise was made for any special time in which the cargo was to be discharged; nor was there any clause in the bill of lading requiring dispatch in discharging. The schooner arrived at *Goderich* on the morning of *October 23d*, and her captain reported that he was ready to begin unloading that morning; but he was told that there were five other vessels ahead of him, and he must wait his turn. The *Grand Trunk Railway* had only one elevator at *Goderich*, and it took until the afternoon of *October 30th* to unload the five vessels which had arrived and reported ahead of the *Finney*. On the afternoon of the *30th* they began unloading the *Finney*, but owing to rough weather they were unable to fully discharge her cargo till about noon of the first of *November*.

I think there can be no doubt of the statement that she was unloaded as soon as it was practicable to do so, at the Grand Trunk elevator, giving precedence to the vessels which had arrived ahead of her with cargoes consigned to the same elevator. The only question in the case is whether the schooner was obliged to await her turn to be unloaded, and whether, there being no stipulation that she should be unloaded within any special time, nor for quick dispatch, her owners can recover for the delay as unreasonable. The parties to the charter must be presumed to have been acquainted with the course of business at the port of destination. It must be assumed that the libellant, or those acting for him in making the charter of his vessel, knew that there was only one elevator belonging to the Grand Trunk Railway Company at Goderich, and that this cargo which he contracted to deliver to the care of that railway company must be unloaded at this elevator.

It also appears from the proof that libellant and his agent, through whom the charter was made, was aware of the fact that other vessels had been chartered for the same port, one of which was owned by libellant, and had sailed only a few days before the charter of the Finney. So he must have known that other vessels were ahead of the Finney, and that she could not be unloaded till after they were, if she arrived after they did. In other words, he must be held to have known that his schooner must be unloaded at the Grand Trunk elevator; that she must wait until vessels which had arrived before her were unloaded; and he knew that others had been chartered and sailed in advance of him, and might possibly, if not probably, have the right to be unloaded ahead of the Finney. This view seems to be fully sustained by the supreme court of the United States in *The Convoy's Wheat*, 3 Wall. 225, and also in *Cross v. Beard*, 26 N. Y. 91; *The Glover*, 1 Brown, 167; Abb. Shipp. 311; *Henley v. Brooklyn Ice Co.* 8 Ben. 471; S. C. 14 Btatchf. 522. There is no proof that the schooner was not unloaded as soon as she could be if she was required to await her turn at the elevator. True, there was one day after the unloading commenced in which they were unable to work on account of the weather, the wind blowing from such a direction as to cause so much sea at the elevator as to make it impossible to work the machinery. This was a sufficient cause for the delay which intervened between the beginning and completion of the unloading.

The further point was made by the defense that the respondent, not being the owner of the cargo of the schooner, but only a carrier



who was to transport it by rail from Goderich to its final destination, is not liable in this action for demurrage; but, with the view I take of the law on the admitted facts, I do not deem it necessary to pass on that question.

The findings of the court will be that the respondent was not in fault, and the libel is dismissed for want of equity.

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THE PETER RITTER.\*

(District Court, E. D. New York. November 16, 1882.)

ADMIRALTY—COLLISION—SAILING VESSELS ON THE SAME TACK—DUTY OF THE OVERTAKING VESSEL.

Where two schooners, the P. and the R., were sailing on the same tack in the East river, the overtaking vessel, the R., sailing faster and a little closer to the wind than the P., and the P. could not luff, and held her course, and, on the approach of the R., those on the P. called out to the R. to keep off, *held*, that it was the duty of the leading vessel to hold her course, and it was the duty of the overtaking vessel to keep off and pass to leeward; and, as she failed to discharge this obligation, she was liable for the damages resulting.

*Alexander & Ash*, for libellant.

*S. B. Caldwell*, for the Ritter.

BENEDICT, D. J. This action is to recover damages for a collision between the schooner Edwin L. Pierce and the schooner Peter Ritter, that occurred in the East river on the twenty-ninth day of July, 1880. Both vessels were beating up the East river, bound to the eastward, and at the time of the collision were upon the same tack. The Edwin L. Pierce was laden with brick; the Peter Ritter laden with clay, and sailing faster than the Pierce. The wind at the time was blowing freshly from the N. W. or N. N. W. At the Hook the Ritter hauled her sheets aft, and stood along up the river close to the wind, on a course which carried her to the eastward of the buoy at the foot of Tenth street about as far as the middle of the river. After the Ritter had hauled round the Hook, the Pierce crossed her bow, standing towards the New York shore on the starboard tack. This tack the Pierce held as far as the reef above Tenth street would permit, and then she tacked and stood over to the Brooklyn shore upon her long leg. Both vessels were then upon the port tack, the Ritter gaining on the Pierce, and lying closer to the wind than the Pierce

\*Reported by R. D. & Wyllie Benedict.

was able to do. As the Ritter drew up upon the starboard quarter of the Pierce, she was hailed by those on the Pierce to keep off. This she failed to do, and her jib-boom catching in the Pierce's mainsail the vessels were thrown together, and damage done to the Pierce.

On the part of the Ritter it is alleged that the Pierce kept off across the Ritter's bows, and so caused the collision. The proof is that the Pierce did not keep off, but held her course as close to the wind as it was possible for her to lie.

Upon these facts the liability of the Ritter is clear. She was the overtaking vessel, and bound to avoid the Pierce. This she could easily have done by keeping a little off the wind and passing the Pierce to leeward. The Pierce could not luff, and if she had kept away she would have been carried across the course of the Ritter. The duty of the Pierce under the circumstances was to hold her course, and this she did. The Pierce not being guilty of any fault, and the Ritter having failed to discharge the obligation to avoid the Pierce, the liability of the Ritter for the damages resulting follows, of course.

Let a decree be entered in favor of the libelant, with an order of reference to ascertain the damages.

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### THE ALZENA.\*

(District Court, E. D. Pennsylvania. October 13, 1882.)

#### 1. PILOTAGE—CONSTITUTIONAL LAW—AUTHORITY OF STATE.

A pilot licensed by the state of Delaware may recover the fees provided by the statute for pilotage services tendered to a vessel on a voyage from a foreign port up the Delaware bay and river to the port of Philadelphia, although the services were refused, and notwithstanding a statute of Pennsylvania prohibiting any one from acting as such pilot without a Pennsylvania license.

*The Ulymene*, 9 FED. REP. 165, and 12 FED. REP. 346, followed.

#### 2. LIBEL—APPROPRIATE REMEDY FOR FEES FOR PILOTAGE SERVICES TENDERED AND DECLINED.

A libel *in rem* may be maintained for fees allowed for pilotage services tendered in accordance with the provisions of a state statute but declined by the master.

In Admiralty. Hearing on libel and answer.

\*Reported by Albert B. Guilbert, of the Philadelphia bar.

This was a libel by John H. Truxton, a pilot licensed under an act of assembly of the state of Delaware, approved April 5, 1881, against the schooner *Alzena*, setting forth that on March 15, 1882, he tendered his services as a pilot to the schooner *Alzena*, sugar laden, then outside of the breakwater, on a voyage from a foreign port up the Delaware bay and river to the port of Philadelphia; that by the provisions of the said act of the state of Delaware the vessel was bound to accept the services of the first pilot who offered, and in case of refusal was liable to him in a sum equal to the pilotage fees, and that the same might be recovered by a libel in admiralty. Though the libelant was the first pilot who offered himself to said schooner, his services were declined by her master, who refused to take a pilot or to pay the libelant his fees. The answer sets forth that the laws of the state of Pennsylvania exempt all vessels from the obligation to take a pilot after they have crossed a straight line drawn from Cape May light to Cape Henlopen light, and denied the right of the state of Delaware to compel vessels bound to and from the ports of Pennsylvania to take her pilots, and the right of libelant to maintain an action *in rem*.

*Curtis Tilton and Henry Flanders*, for libelant.

*H. G. Ward and M. P. Henry*, for respondent.

BUTLER, D. J. The decision in *The Clymene*, 9 FED. REP. 165, and 12 FED. REP. 346, covers everything embraced in this case, except the question of remedy; and this must be determined against the respondent. In view of the following authorities no discussion seems necessary: *The America*, 1 Low. 178; *The California*, 1 Sawy. 463; *The George S. Wright*, 1 Deady, 591; *The Glencarne*, 7 FED. REP. 604.

A decree must be entered in favor of the libelant.

McKENNAN, C. J., sat on the argument, and concurred in above opinion

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**PILOTAGE.** The power of congress to legislate on any subject is exclusive only when a uniform rule is required; but where it requires rules in different localities, the state may legislate in the absence of congressional legislation. (a) It is exclusive only when exercised. (b) Or where the subject is national, and

(a) *Cooley v. Board of Port Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713; *Ex parte McNeill*, 13 Wall. 240; *Pound v. Turek*, 95 U. S. 462; *Mitchell v. Steelman*, 8 Cal. 363; *Cran-*

*dall v. Nevada*, 6 Wall. 35; *People v. Cent. Pac. R. Co.* 43 Cal. 404.

(b) *Ogden v. Saunders*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Master v. Ward*, 14 La. Ann. 289; *Master v. Morgan*, Id. 595.

admits of only one plan of regulation.(c) Or in cases where the states are expressly prohibited.(d) It is not so exclusive as to prevent states from enacting laws necessary to internal police.(e) The commercial clause in the federal constitution does not operate as an absolute prohibition on the states to legislate on the subject.(f) The mere grant of power to congress to regulate commerce does not forbid states from passing laws on the same subject. They have concurrent power on the subject.(g) And so a territory may legislate, it being "a rightful subject of legislation."(h)

The grant to congress by the constitution of the power to regulate commerce does not of itself deprive the states of the power to regulate pilots; and congress has not by legislation deprived the states of their power to legislate on the subject,(i) but, on the contrary, state laws have been confirmed.(j) But existing regulations or provisions making discrimination in the rates of pilotage between vessels sailing between the ports of different states, or any discrimination against steam-vessels or national vessels, are annulled and abrogated.(k) So states may pass laws for the regulation of pilots, if they neither give a preference, of one port over another, nor require vessels to pay duties.(l) The statutes of the several states regulating the subject of pilotage, in view of the numerous acts of congress recognizing and adopting them, are to be regarded as constitutional, until congress by its own acts supersedes them;(m) but they are immediately abrogated when an act is passed by congress which conflicts with them.(n) But the passage of congressional acts regulating pilots does not release pilots from the penalties incurred under state laws.(o)—[ED.

(c) *Cooley v. Board of Port Wardens*, 12 How. 299.

(d) *In re Brinkman*, 7 Bank. Reg. 425.

(e) *Com. of Pilotage v. The Cuba*, 28 Ala. 185.

(f) *Id.*

(g) *Cooley v. Board of Port Wardens*, 12 How. 319; *People v. Coleman*, 4 Cal. 46; *Cisco v. Roberts*, 6 Bosw. 494; *Dryden v. Com.* 16 B. Mon. 593.

(h) *Edwards v. The Panama*, 1 Or. 418.

(i) *Cooley v. Board of Port Wardens*, 12 How. 299.

(j) Act of Congress of August 7, 1799, § 4, (1 St. at Large, 54.)

(k) Act of July 13, 1866, (14 St. at Large, 93.)

(l) *Cooley v. Board of Port Wardens*, 12 How. 299; *The Wheeling Bridge Case*, 18 How. 421.

(m) *Ex parte McNeil*, 13 Wall. 236.

(n) *The Panama, Deady*, 27.

(o) *Sturgis v. Spofford*, 45 N. Y. 446.

## FULLER and others v. COUNTY OF COLFAX.

(Circuit Court, D. Nebraska. November Term, 1882.)

## REMOVAL OF CAUSE—COURTS—SUITS REMOVABLE.

A board of county commissioners of a county created by the laws of the state of Nebraska, is in no just or proper sense a *court* within the meaning of the removal acts of congress; and a mere claim against a county for right of way for a public road, while the same is pending before the county board, does not constitute a *suit* within the meaning of the said removal acts.

Motion to Remand Cause to State Court.

Mr. Wakeley, for plaintiff.

Mr. Munger, for defendant.

DUNDY, D. J. This cause was removed into this court from a state court held within and for Colfax county. The defendant moves to remand the same, for the reason that the suit was removed from an appellate court and not from the one in which the suit was brought. If this be true it must, of necessity, be decisive of the motion.

In considering the motion two questions arise—*First*, is a board of county commissioners a *court* within the meaning of the removal acts of congress; and, *second*, is a mere claim for damages for right of way for a public road, presented to the county board, a *suit* within the meaning of the said removal acts, so long as the claim there remains for consideration.

The state law provides for paying for the right of way necessary in locating all public roads. If damages are sustained by the owners of land through which a road is located, the county is primarily liable therefor, and the manner of making the claim as well as the mode of making the payment is here perfectly well understood. After the location of the road all that seems to be necessary for the injured party to do is to make known to the county board the fact that damages are claimed for the right of way. If the claim is thought to be just and reasonable the county board allows it, and draws warrants on the county treasury for the amount of damages awarded. If the claimant should be dissatisfied with the amount of damages so awarded him, he can appeal to the district court of the proper county, where the case is to be tried *de novo*. Thus it will be seen that the remedy provided by law in cases like the present one is alike speedy, efficacious, inexpensive.

The plaintiffs were damaged, as they claim, in consequence of a public road being located through their lands; and they presented

to the county board a claim in the sum of \$5,000 therefor. The board reduced the claim, or sum allowed, to \$250, and the claimants appealed to the district court, *all* of which was done in strict accordance with the law. In presenting a claim to the county board for allowance, no formal proceedings are at all necessary, no pleadings of any sort are required to be filed, no process issued for any purpose whatever connected with the matter, and no formal judgment follows either the rejection or allowance of a claim by the board. The claim, when so made, is simply *audited, allowed, or rejected*, as justice and reason seem to require. In case of an appeal to the district court, the appeal is docketed, and pleadings are filed, and the cause then in all respects proceeds in the usual and ordinary way. The cause is then, in every sense of the term, in a *court*, and is also, then, in every sense of the term, a *suit*.

Now, what is usually understood by the words "*court*" and "*suit*," where we find them in legislative enactments or in legal proceedings? Blackstone says a "court is a place wherein justice is judicially administered." To administer justice judicially, there *must* be a *judge*, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court, so that jurisdiction may be acquired over the person or property which forms the subject-matter of the controversy. To administer justice judicially, two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the "justice to be judicially administered" results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation. But this is not so with the county boards in this state. They are not clothed with the necessary power to issue compulsory process to bring parties litigant before them. They cannot, in cases like the one under consideration, issue process to compel the attendance of witnesses. They cannot and do not enter formal judgments in cases presented to them for their consideration. They have no authority to execute any judgments if they should thoughtlessly undertake to enter them. They have but one party before them on whom their orders can operate. In short, the county board is so totally unlike a *court*, and so differ-

ent in its constitution and its objects, that I am unable to see any similarity between them.

If the county board cannot be regarded as a *court*, it will follow as a necessary consequence that no *suit* was pending in this case until the appeal from the order of the board was filed and docketed in the district court. Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such a condition of things existed so long as this claim remained before the county board. But when the appeal was taken, and docketed in the district court, we then for the first time find a *suit* pending in the *court* where none of the elements of either are wanting. It is such a *suit* that can be removed from such a *court*, as the removal acts of congress contemplate.

I conclude, then, that the board of county commissioners of Colfax county is not a "*court*," and that this "*suit*" was never pending in any other court than the district court of Colfax county, from which it was removed to this court, and that it was, therefore, properly removed herein.

The motion to remand is overruled.

McCRARY, C. J., concurs.

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A cause may be removed from any state court, whether of limited or general jurisdiction, if citizenship and amount are within the statute requirements, (*Gaines v. Fuentes*, 92 U. S. 10; S. C. 8 Chi. Leg. News, 225;) but a justice's court is not a state court, (*Rathbone Oil Co. v. Rausch*, 5 W. Va. 79.) The right is confined to parties litigant in state courts. The act does not apply to territorial courts, although on the admission of such territory as a state the suit passed into the jurisdiction of the state court. *Ames v. Colorado Cent. R. Co.* 4 Dill. 251; S. C. 4 Cent. Law J. 190. See *Watson v. Brooks*, 13 FED. REP. 540. So, actions brought by the District of Columbia against an alien cannot be removed. *Cessel v. McDonald*, 57 How. Pr. 175; S. C. 16 Blatchf. 150.—  
[Ed.]

## HART v. CITY OF NEW ORLEANS.\*

(Circuit Court, E. D. Louisiana. November, 1882.)

## REMOVAL OF CAUSES UNDER REV. ST. p. 639, § 3—AFFIDAVIT.

The affidavit required by the act of 1867 (14 St. 558; Rev. St. p. 639, § 3) to be made by the petitioner for the removal of a case from a state court to the federal court, on account of "prejudice and local influence," may, in the absence of the petitioner, be made by his attorney of record, if the affiant swears that both himself and his client "have reason to believe, and do believe, that from prejudice and local influence he *will not be* able to obtain justice."

A. G. Brice and Edward H. Farrar, for plaintiff.

Charles F. Buck, City Atty., for defendant.

BILLINGS, D. J. The cause is submitted on a motion to remand, the question being whether, under the local-prejudice act of 1867, the affidavit may be made by the attorney of record. The affidavit is in the form prescribed by the statute, that *the plaintiff*, who is a citizen of the state of New York, "has reason to believe, and does believe, that from prejudice and local influence he will not be able to obtain justice." The affidavit sets out the absence of the plaintiff as the reason why the affidavit is not made in person by him, and the hardship which will result from the times of the recurrence of the terms of the United States circuit court, whereby a long delay will be necessitated in the progress of the cause, and is accompanied by a petition of the plaintiff, through his attorney, for a removal.

The question is whether this affidavit is an affidavit *made* by the plaintiff, within the meaning of the statute. I think the object and history of the statute show that it is. Under the act of 1789 an alien or citizen of another state must be a defendant, and must be sued alone in order to be entitled to remove. The act of 1866 (14 St. 306) provided that a defendant, who was an alien or foreign citizen, might remove his cause even when he was sued with others, and the purpose of the suit was to enjoin him, or when his controversy was severable from that of the other defendants. This act of 1867 (14 St. 558) is declared to be amendatory of the last, and permits any foreign citizen, be he plaintiff or defendant, who has a suit pending with a resident citizen in the courts of the state of the latter, to remove the cause upon making and filing the affidavit. The object of the statute was, in cases which, according to the federal constitution, were embraced within the judicial power of the Union, to give any

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.



foreign citizen the right peremptorily to elect to have his cause tried in the courts of the Union if he exhibited to the court proof by affidavit that he feared he could not obtain justice by reason of local prejudice. The allegation of local prejudice cannot be traversed, and need not specify any grounds. When made and exhibited to the court in the form of an affidavit, it works absolutely and arbitrarily a removal. The election of the party to remove, and the statement of his fear and belief, verified by the oath of some person who reasonably knows the same, are, it seems to me, the sole requisites imposed by congress. To require more would restrict unreasonably the protection afforded by the law. The affidavit in behalf of a party in his absence, made by the attorney, as to a fact which the attorney might and almost necessarily must know, affords to the opposite party even a better security than that of the client could, and is the affidavit made by the party, within the meaning of the statute.

The motion to remand is denied.

See *Hobby v. Allison*, 13 FED. REP. 401, and note, 405.

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### DEFORD, HINKLE & Co. v. MEHAFFY and others.

(Circuit Court, W. D. Tennessee. November 11, 1882.)

#### REMOVAL OF CAUSE—INDISPENSABLE PARTIES—GARNISHEES.

Although certain defendants were made parties to a bill in equity on the allegation that they were indebted to the principal defendant, and thus became real parties to the suit, yet it does not follow that they are indispensable parties to the controversy.

*Stokely Hays*, for the motion.

*H. W. McCorry*, contra.

HAMMOND, D. J. This is a second motion to remand this case, upon a ground not urged on the hearing of the first motion, which was overruled. *Deford v. Mehaffy*, 13 FED. REP. 481. It is now said that the defendants who were made parties upon the allegation that they were indebted to the principal defendant are citizens of this state, as are the plaintiffs, and that this defeats our jurisdiction. The case of *Hyde v. Ruble*, 194 U. S. 407, is relied upon. I think it has no application. While the resident defendants to this bill in equity do not occupy precisely the attitude of mere garnishees at law, in the sense that the case can be said to be at issue before they

answer or there has been *pro confesso* against them, they are not, though proper parties, indispensable parties, and they have no such interest in the controversy as makes this an inseparable controversy with citizens of the same state as the plaintiff, thereby defeating our jurisdiction. The judgment on the former motion does not lead to this result. It was there held that, unlike bare garnishees at law, these defendants were substantially *parties* to the record,—not *quasi* parties, but real parties,—entitled to answer, and the case was not ready for trial, so as to close the principal defendant's right of removal by a lapse of the first trial term, until they had answered, or there had been a *pro confesso*. But it does not follow that they are indispensable parties to the controversy with the principal defendant, and as they clearly are not, the motion to remand must be overruled. So ordered.

Since the foregoing judgment, Mr. Justice HARTAN's opinion in the case of *Bacon v. Rives*, not yet reported,\* (to appear in 105 U. S.,) has been received, It fully sustains the above ruling.

HAMMOND, D. J.

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Nominal parties are not to be treated as parties, although made parties, to the suit, (*Livingston v. Gibbons*, 4 Johns. Ch. 94; *James v. Thurston*, 6 R. I. 428;) so, if a citizen of the state where suit is brought is not a necessary party, and his presence is not essential, the non-resident defendant may remove, although the former does not unite in the petition, (*Hatch v. Chicago, R. I. & P. R. Co.* 6 Blatchf. 105; *Ex parte Girard*, 3 Wall. Jr. 263; *Hadley v. Dunlap*, 10 Ohio St. 1; *Livingston v. Gibbons*, 4 Johns. Ch. 94;) and if all the defendants join but one, and that one is an unnecessary party, the cause may be removed, (*Cooke v. Seligman*, 7 FED. REP. 263.) The right to a removal is not affected by the fact that a defendant, a citizen of the same state, is a proper but not an indispensable party to a separable controversy. *Barney v. Latham*, 103 U. S. 205. So, where a landlord, the real owner, assumes the defense, he makes himself a party, and, being the real defendant, may remove the cause if he has the requisite citizenship, (*Greene v. Klinger*, 10 FED. REP. 689; *Wilber v. Nat. Bank*, 12 Chi. Leg. N. 75;) and so where a tenant disclaims title and has the landlord substituted as defendant, (*State v. Lewis*, 12 FED. REP. 1, and note, p. 7; see *Allin v. Robinson*, 1 Dill. 119; *Relfe v. Rundie*, 103 U. S. 222; *Chafraix v. Board of Liquidation*, 11 FED. REP. 638.) Where a married woman, sole owner of a patent, brings suit thereon for an infringement, her husband need not be a party. *Lorillard v. Standard Oil Co.* 18 Blatchf. 199.

Where the real party to a controversy is clearly entitled to have his rights passed upon by the courts of the United States, he is entitled to remove, although the the nominal party has no such right, (*Cohens v. Virginia*, 6 Wheat. 264,) and though the nominal party be a party on the record, (*Greene v. Klinger*,

\*See now *Bacon v. Rives*, 5 Morr. Trans. 35.

10 FED. REP. 689.) So, in ejectment, the sole owner may remove, although his grantor, a citizen of the same state as plaintiff, is a party. *Calloway v. Ore Knob Co.* 74 N. C. 200. Officers of a corporation, joined as defendants in equity, but as to whom no relief is prayed, are nominal parties, such as will not defeat the right to a removal. *Latch v. Chicago, R. I. & P. R. Co.* 6 Blatchf. 105; and see *Pond v. Sibley*, 7 FED. REP. 129; *Nat. Bank of Lyndon v. Wells Riv. Manuf'g Co.* 7 FED. REP. 750. State and county officers are not necessary parties to a controversy relating to the validity of bonds. *Town of Aroma v. Auditor*, 2 FED. REP. 33. Jurisdiction is not defeated by joining as nominal parties the executors of a deceased person, citizens of the same state as complainant. *Walden v. Skinner*, 101 U. S. 577. A garnishee is not a party to the suit, as proceedings in garnishment process are but incident to the suit. *Cook v. Whitney*, 3 Woods, 715. See *Ellis v. Sisson*, 11 FED. REP. 353.—[ED.]

## HALL v. DEVOE MANUF'G CO

(District Court, D. New Jersey. November 14, 1882.)

### 1. JURISDICTION—FEDERAL COURTS.

The extent of the jurisdiction of the federal courts cannot be restricted or enlarged by state legislation or agreement; but such legislation or agreement may give definiteness or certainty to questions which congress had necessarily left undetermined.

### 2. SAME—COMPACT BETWEEN STATES.

By the compact entered into in 1833 between the states of New York and New Jersey, approved by act of congress, June 28, 1834, (4 St. at Large, 711,) it was agreed that the state of New York has exclusive jurisdiction of and over all the waters of Hudson river, and of and over the lands covered by the said waters, to the low-water mark on the New Jersey shore; and the state of New Jersey has the exclusive right of property in and to the land under the water lying west of the middle of the river, and exclusive jurisdiction of and over the wharves, docks, and improvements made and to be made on the Jersey shore, and on vessels aground on said shore, or fastened to any such wharf or dock, (except as to quarantine regulations,) and the exclusive right of regulating the fisheries on the westerly side of the middle of the river.

### 3. SAME—DISTRICT OF NEW JERSEY.

A vessel fastened to a wharf or pier on the western side of the Kill von Kull is within the exclusive jurisdiction of New Jersey.

Denying *The L. W. Eaton*, 9 Ben. 289.

*Libel in personam.*

*Scudder & Carter*, for the Devoe Manufacturing Company.

*Beebe, Wilcox & Hobbs*, for libelant.

NIXON, D. J. A libel *in personam* was filed in the above case, alleging as the cause of action a collision between the canal-boat T. W. Griffin, whereof the libelant was owner, and the tug-boat F. W.

Devoe, whereof the Devoe Manufacturing Company was owner. The collision occurred in March, 1882, on the East river, near the mouth of Newtown creek, in the eastern district of New York. A monition issued with the usual attachment clause. The marshal has made his return that the respondent, a foreign corporation, was not found in his district, and that he had seized the tug-boat F. W. Devoe, and held the same to respond to the libellant's claim for damages. A motion is now made to set aside the service of process on the ground of a want of jurisdiction in the court.

It appears from affidavits filed and used at the hearing that on the twenty-seventh of October last, when the seizure was made by the marshal, the F. W. Devoe was lying in the Kill von Kull, between Staten Island and New Jersey, fastened to the end of a dock at Bayonne, in New Jersey, two or three hundred feet below low-water mark, and about half a mile from the entrance to the bay of New York. The proctor for the respondent insists that although the tug, when seized, was fastened to a pier extending into the water from the New Jersey shore, she was lying below low-water mark in Kill von Kull, and hence was within the exclusive jurisdiction of the eastern district of the state of New York. The precise claim is that in all admiralty proceedings the jurisdiction of the district court of the United States for the southern and eastern district of New York extends over the waters of the Hudson river and Kill von Kull to low-water mark on their western shores, to the exclusion of the district court of the United States for the state of New Jersey. The question is an important one, involving large interests, and demands careful consideration. If the construction contended for can be fairly given to the legislation of congress in defining the judicial districts of New Jersey and New York, the people of the first-named state have been laboring under a delusion for many years in regard to its territorial boundaries, and the judges of this court have been exercising unwarrantable authority over cases in admiralty which should have been tried and determined in the districts of our sister state.

The question came before the late circuit judge (BLATCHFORD) of the southern district of New York, in 1878, in the case of *The Schooner L. W. Eaton*, and seems to have been examined by him with great care. 9 Ben. 289. The vessel had been attached by the marshal of the New York district on the first of April, 1875, being at the time afloat, and fastened by means of lines to a dock at Jersey City and outside of low-water mark, the wharf projecting into the navigable waters of the Hudson river, west of Manhattan island, and to the south of the

mouth of Spuyten Duyvil creek. A motion was made on behalf of the claimant to discharge the attachment, on the ground that the vessel was not, at the time of the seizure, in the jurisdiction of the court. The learned judge denied the motion and filed an elaborate opinion, in which he held—

(1) That it was the established law of that district that the *locus in quo* in such a case was within the jurisdiction of the southern district of New York in admiralty; (2) that said jurisdiction existed prior to the agreement of September 16, 1833, between New York and New Jersey, which agreement is set forth in the act of congress of June 28, 1834, (4 St. at Large, 708) and that nothing within the agreement or the act restricted the jurisdiction; and (3) that sections 541 and 542 of the Revised Statutes did not have the effect of altering the jurisdiction.

It is quite obvious, from carefully reading his opinion, that when he assumed it was the established law of his district that the *locus in quo* was within his jurisdiction, the judge only meant to assert that his distinguished predecessor, Judge BETTS, had so declared the law. I cannot find that the question was ever discussed before May, 1860, when it arose before Judge BETTS in the case of *U. S. v. Ship Julia Lawrence*.<sup>\*</sup> His opinion was never published in any volume of his admiralty decisions, and its full text first appears in Judge BLATCHFORD's opinion. The jurisdiction of the New York court over the place of the seizure was challenged in that case, it being admitted on both sides that the ship when seized was attached to a pier or dock on the New Jersey side of the river and upon waters of the bay. Judge BETTS states that two questions were debated before him on the issue of law. The first regarded the actual boundary line of the southern district of New York. He does not say what the second was, but it is to be inferred from his subsequent reasoning that it had reference to the effect which the arrangement entered into between the states of New York and New Jersey respecting their mutual boundary line had upon the antecedent legislation of congress. He correctly holds that any variation of the line, made by the assent of New York, subsequent to the establishment of the United States judicial districts, would not affect the dimensions and authorities of those districts, without the full concurrence of the government of the United States in such change.

Entertaining such profound respect for the opinion of this able judge, I wish to suggest, with much diffidence, that the unsound conclusions which he reached arose from two false assumptions. He as-

<sup>\*</sup>6 Amer. Law. Rev. 383.

sumed (1) that the judiciary act of 1789 fixed the boundary line of the district of New York to low-water mark on the western shore of Hudson river; and (2) that the agreement entered into in 1833, between New York and New Jersey, in regard to the boundary, altered or changed some previously-existing line. If it can be shown that no foundation in fact existed for such premises, not much weight should be given to the conclusions drawn from them.

1. As to the first assumption, the second section of the judiciary act, approved September 24, 1789, (1 St. at Large, 73,) divides the United States into 13 judicial districts, and its only statements in regard to New Jersey and New York are, "one to consist of the state of New York, and to be called the New York district, and one to consist of the state of New Jersey, and to be called the New Jersey district." It is an historical fact that at that time there was an existing controversy between these states respecting the proper running of the line dividing their jurisdiction—New York claiming the whole of the Hudson river to the low-water mark of the western shore, and New Jersey insisting that her territorial boundary extended to the middle of the river. Congress did not attempt to settle the conflict; expressed no opinion on the question of boundary; but simply constituted the districts, limiting their jurisdiction to state lines, wherever the interested parties should afterwards determine these lines to be.

I find nothing more definite in this respect in the act of April 9, 1814, (3 St. at Large, 120,) when congress divided New York into two districts, although Judge Betts states in his opinion that he discovers there "more distinctness of discrimination in the restatement of the boundary line" than he did in the act of 1789. The only reference to the subject is in the first section, where it is enacted that "the counties of Rensselaer, Albany, Schenectady, Schoharie, and Delaware, together with all that part of the state lying south of the above-named counties, shall compose one district, to be called the southern district of New York, and all the remaining part of the said state shall compose another district, to be called the northern district of New York."

His honor, Judge BLATCHFORD, seems to lay great stress upon the fact that "by the Revised Statutes of New York, which took effect January 30, 1830, it was declared that the boundary of the state of New York, as its jurisdiction was then asserted, ran from a point on the west side of the Hudson river, in the latitude of 41 degrees north, southerly along the west shore at low-water mark of Hudson river, of

the Kill von Kull, of the sound between Staten Island and New Jersey, and of Raritan bay to Sandy Hook, in such manner as to include \* \* \* all the islands and waters in the bay of New York, and within the bounds above described. Clearly," says the learned judge, "the *locus in quo* in this case [Eaton] was, by such description, within the state of New York, and it was therefore within the southern district of New York."

In reply it may be suggested that many years before, to-wit, on the third of December, 1807, the legislature of New Jersey passed an act which declared, after reciting in the preamble that the commissioners of the states of New York and New Jersey had met and failed to come to an amicable adjustment of the eastern boundary line of the state, and that it was necessary to preserve the lawful jurisdiction of the state until the existing controversy was brought to a legal conclusion and determination, that the boundary line of the county of Bergen (then adjoining the Hudson river, Kill von Kull, and New York bay) extended to the middle or midway of the waters adjoining said county, and imposed severe penalties upon all persons who attempted, without authority from New Jersey, to execute legal process therein. Would it not be quite as pertinent to respond: "Clearly, the *locus in quo* in this case was by such description within the state of New Jersey, and was therefore within the jurisdiction of its district court?"

It may be added in this connection that the act to create the eastern district of New York was approved February 25, 1865, and the language there employed reveals the same congressional intention to limit the jurisdiction to state lines. The first section declares that the counties of Kings, Queens, Suffolk, and Richmond, in the state of New York, with the waters thereof, are constituted a separate judicial district of the United States, to be styled the eastern district of New York. The second section gives to the district court of the eastern district concurrent jurisdiction with the district court for the southern district over the waters within the counties of New York, Kings, Queens, and Suffolk, in the state of New York, and over all seizures made and matters done in such waters. By a singular oversight no concurrent jurisdiction was provided for the county of Richmond (Staten Island) and its waters; and as the Kill von Kull are, in part, the waters between the county of Richmond, in New York, and the state of New Jersey, the *locus in quo* in this case, if not in New Jersey, is within the exclusive jurisdiction of the eastern district. This district is expressly limited to counties in the state of

New York, and as it has been created long since the year 1833, when the two states definitely settled their boundaries, it will hardly be insisted that its jurisdiction is not to be limited and determined by the agreement or compact of 1833. But I prefer to put my denial of the motion in this case upon other and higher ground.

2. The second assumption is that the agreement of 1833 altered or changed some previously-existing boundary line between the states. It did not alter or change what was before fixed, but rather established what was before unsettled. It is conceded that New York had always claimed the whole of Hudson river to low-water mark on the western shore; but New Jersey never acceded to the claim. In colonial times her authorities had insisted that a just construction of the grant from the Duke of York to Berkley and Carteret allowed the jurisdiction of the province to extend to the middle of the Hudson river. At the close of the revolutionary war the state renewed the contention on the additional ground that her boundary was thus secured by reason of the conquest from the British crown. The controversy led to the appointment of commissioners by the respective states, first in 1806, then in 1824, and finally in 1833, to adjust the conflicting claims. A brief reference to the legislation of the two states will show the nature, character, difficulty, and result of the contest.

On the twenty-first of November, 1806, (Pub. Laws, 751,) the legislature of New Jersey, after a long preamble setting forth with minute particularity the claims of the state under its colonial charter and by right of conquest from the mother country, appointed five commissioners, with full power and authority on behalf of New Jersey to meet and make a final agreement with commissioners to be appointed on behalf of New York, "to settle the limits and extent within which they shall exercise their rights of jurisdiction respectively in and over all the waters lying and being between the shores of said states; and, further, to settle the eastern boundary of New Jersey, as to them may seem just and reasonable."

The legislature of New York promptly responded, and on the third of April following (Pub. Laws 1807, p. 124) appointed five commissioners to meet those from New Jersey "to settle all disputed claims as to territory and jurisdiction." The commissioners met, and as neither side was prepared to recede from the position of the respective states, they separated without coming to an agreement.

On the third of December, 1807, (Pub. Laws, 13,) the legislature of New Jersey passed the act above referred to, wherein, after reciting the failure of the commissioners to come to any amicable ad-



justment of the eastern boundary of the state, again asserted the right of New Jersey to extend to the middle of the Hudson river; prescribed the punishment to be inflicted upon all persons who, without the leave of the state, attempted to exercise any authority thereover; placed in the hands of the governor \$3,000 to be expended by him in prosecuting and defending to final judgment any suit or suits which he deemed necessary for finally determining the jurisdictional line between the states; and also renewed the powers of the commissioners before appointed to resume negotiations, provided the state of New York authorized its commissioners to do the same.

The legislature of New York answered on the sixth day of April following (Pub. Laws 1808, p. 313) by reiterating the claim of the state to the whole of Hudson river, and imposing penalties upon all persons who attempted to exercise any authority thereon under the state of New Jersey.

No further steps for the settlement of the controversy were taken on either side until December 10, 1824, when the legislature of New Jersey enacted another law, authorizing the governor to appoint five commissioners, to meet a like number to be chosen by New York, to determine the limits of territory and jurisdiction between the two states. No notice being taken of this by New York, and the law expiring by its own limitation on the first of December, 1826, (Pub. Laws, 25,) the legislature revived and continued in force the act until November 1, 1827.

The legislature of New York responded on the twenty-seventh of April following, (Pub. Laws 1827, p. 326,) and after reciting in a preamble that New York was always disposed to settle any differences that existed between her and any neighboring state upon amicable principles, appointed five commissioners with full powers, to meet the commissioners of New Jersey, "to agree upon, settle, and determine the limits of territory and jurisdiction between said states. These commissioners also failing to come to any agreement, the New Jersey commissioners, in 1827, proposed to have the controversy in respect to the boundary submitted to the supreme court of the United States, as an impartial tribunal, to arbitrate between the parties, which the New York commissioners declined.

All attempts at adjustment proving abortive, on the sixth of March, 1828, (Pub. Laws, 199,) the legislature of New Jersey determined to bring the question to a close, and passed an act reciting in a pre-

amble that disputes had existed for many years between the states of New Jersey and New York relative to the eastern boundary of New Jersey, and more particularly as the said boundary concerned the Hudson river and adjacent waters, and that several unavailing efforts had been made on the part of New Jersey to settle said disputes by amicable negotiation, and then directed the attorney general of the state to institute legal proceedings in the supreme court of the United States, in the name and on behalf of the state of New Jersey, against the people of the state of New York, for the purpose of ascertaining and establishing the questions relative to boundary and jurisdiction between the states as they respected the eastern boundary of New Jersey. Such suit was begun in the month of June, 1829. The bill filed alleged—

“That the state of New Jersey was justly entitled to the exclusive jurisdiction and property of and over the waters of Hudson river from the forty-first degree of north latitude to the bay of New York, to midway of said river, and to the midway or channel of said bay of New York, and the whole of Staten Island sound, together with the land covered by the water of said river, bay, and sound to the like extent.”

The governor of New York, in a message, called the attention of the legislature to the pendency of said suit. See *People v. Cent. R. Co. of N. J.* 42 N. Y. 291. For the first time during the whole continuance of the dispute the legislature of New York now took the initiative in renewing negotiations, and on the eighteenth of January, 1833, passed an act (Pub. Laws, 6) authorizing the governor to appoint three commissioners to meet commissioners who might be appointed by the state of New Jersey to negotiate and agree respecting the territorial limits and jurisdiction of the two states.” New Jersey at once responded, and on the sixth of February following empowered the governor to appoint three commissioners to meet those appointed by the governor of New York under the provisions of the foregoing act, and with them “to negotiate and agree respecting the territorial limits and jurisdiction as to them might seem just.” The commissioners appointed by the governors of the respective states under this legislation were six of their eminent public men—Benjamin F. Butler, Peter Augustus Jay, and Henry Seymour, on the part of New York, and Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer, on the part of New Jersey. After several conferences they came to an amicable adjustment of the conflicting claims on the sixteenth of September, 1833, in the city of New York. By article 8

of the agreement it was not to become binding on the two states until confirmed by the legislatures thereof, respectively, and approved by the congress of the United States. It was ratified and confirmed by the state of New York on the fourth day of February, 1834, by the state of New Jersey on the twenty-sixth of February, 1834, and approved by congress June 28, 1834. 4 St. at Large, 711.

I think it is conclusive from this review of the claim and action of the two states in regard to their boundary line, and the methods adopted for its amicable adjustment, that the question was an open one in 1789, and that no settlement was reached until the agreement of the commissioners was ratified and approved in 1834. It is not to be assumed, as my learned brethren of the New York district assume, that congress, in creating the districts of New York and New Jersey, adopted the claim of boundary then made by New York rather than the claim of New Jersey. It follows from this view that the agreement or compact of 1833 must be regarded as rendering certain what was before uncertain respecting the territorial jurisdiction of the district courts of the United States for New York and New Jersey. While it is admitted that the extent of the jurisdiction of the federal courts cannot be restricted or enlarged by any state legislation or agreement, I see no difficulty in invoking such legislation or agreement to give definiteness and certainty to questions which congress had necessarily left vague and undetermined.

We are now brought to the inquiry, what adjustment was made by the commissioners of these long-pending conflicting claims? The subject-matter of the reference was territorial limits and jurisdiction. The first article of the compact relates to the division of the territory in dispute, and the remaining articles to the jurisdiction over the same. Article 1 fixes the boundary line between the two states from a point in the middle of Hudson river, opposite the point on the western shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea—at the middle of the said river, of the bay of New York, of the water between Staten Island and New Jersey, and of Raritan bay, to the main sea—except as therein otherwise particularly mentioned.

Mr. Justice ELMER, the last surviving member of the commission, and whose thorough knowledge of all the steps leading to the agreement places him in a favorable position to interpret its precise meaning, has so succinctly stated the substance of the various articles in regard to jurisdiction, that I shall content myself with quoting his language. In the case of *State v. Babcock*, 30 N. J. Law, 30, he says:

"By the compact \* \* \* the state of New York has exclusive jurisdiction of and over all the waters of Hudson river, and of and over the lands covered by the said waters to the low-water mark on the New Jersey shore; and the state of New Jersey has the exclusive right of property in and to the land under the water lying west of the middle of the river, and exclusive jurisdiction of and over the wharves, docks, and improvements made and to be made on the Jersey shore, and on vessels aground on said shore, or fastened to any such wharf or dock, (except as to quarantine regulations,) and the exclusive right of regulating the fisheries on the westerly side of the middle of the river."

The learned Judges BETTS and BLATCHFORD seem to attach much importance to the fact that congress, when it ratified the state compact, added a proviso that nothing therein contained should be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands or waters which formed the subject of the agreement. This was probably added from excess of caution on the part of the legislature. It is not apparent how the mere assent of the national government to the adjustment of boundaries and jurisdiction between states, whereby the exercise of authority by federal courts on each side of the line is definitely determined, could in any manner affect a right of jurisdiction of the United States.

The vessel being fastened to a wharf or pier on the western side of the Kill von Kull, was within the exclusive jurisdiction of New Jersey, and the motion to set aside the attachment must be denied.

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**TERRITORIAL EXTENT OF JURISDICTION.** The jurisdiction of the United States courts is in general restricted to the territorial limits within which they are placed. (a) And they cannot send their process outside these limits except where specially authorized to do so by congress. (b) A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. (c) Whatever may be the extent of the jurisdiction over the subject-matter, in a suit in respect to jurisdiction over persons and property, it can only be exercised within the limits of the judicial district. (d) The circuit court has jurisdiction only over the inhabitants of the district, or persons found therein, and served with process. (e) The jurisdiction of the circuit court is co-extensive with the limits of the state. (f) Where there are two districts in a state, a citizen of such state is liable to suit in either

(a) *Wilson v. Graham*, 4 Wash. C. C. 53; U. S. v. Alberty, Hempst. 444.

(b) *Ex parte Graham*, 3 Wash. C. C. 456.

(c) *Picquet v. Swan*, 5 Mason, 35; *Ex parte Graham*, 3 Wash. C. C. 456.

(d) *Toland v. Sprague*, 12 Pet. 300; *Picquet v. Swan*, 5 Mason. 35.

(e) *Pollard v. Dwight*, 4 Cranch, 424; *Anderson v. Shaffer*, 10 Fed. Rep. 266.

(f) *Shrew v. Jones*, 2 McLean, 78.

district if served with process.(g) Although consent of parties cannot confer jurisdiction on a court of the United States, yet the parties may admit the existence of facts, and the court may found its jurisdiction on such admission.(h) An action may be maintained in the circuit court, although the right to sue is given by a state law;(i) but the party must take his remedy in the same manner as he would in any other competent tribunal, and may be enjoined in a proper case.(j) A municipal corporation may be sued although the statute creating it exempts it from suits elsewhere than in the state court.(k)

NOT AFFECTED BY STATE LEGISLATION. The jurisdiction of the United States courts cannot be affected by state legislation. They will enforce equitable rights if they have jurisdiction of the subject-matter and the parties.(l) And the fact that the legislature has conferred jurisdiction on state courts to enforce such rights does not oust the jurisdiction of the federal courts.(m) The state legislature cannot authorize the institution of a suit against a receiver appointed by a federal court,(n) nor can it require leave of court before bringing an action on a judgment rendered by a state court.(o)

SOUTHERN DISTRICT OF NEW YORK. The following are the cases affected by the above decision: The district court for the southern district of New York has jurisdiction over a vessel attached in the Morris canal basin, at Jersey City.(p) Its jurisdiction does not extend below low-water mark on the New Jersey shore.(q) It has jurisdiction, although the vessel, when seized, was attached to a pier on the New Jersey side of the North river, and upon the waters of the bay.(r) The *L. W. Eaton* was attached by the marshal under process issued by the district court for the southern district of New York, while she was afloat in the navigable waters of the Hudson river, lying west of Manhattan island, and to the south of the mouth of Spuyten Duyvil creek, and where the tide ebbed and flowed, she being fastened by means of a line to a dock at Jersey City, in the State of New Jersey, and outside low-water mark, said wharf projecting into the navigable waters of the Hudson river lying west of Manhattan island, and to the south of the mouth of Spuyten Duyvil creek.(s)—[Ed.

(g) *McMicken v. Webb*, 11 Pet. 25; *Vore v. Fowler*, 2 Bond, 294; *Locomotive Co. v. Erie R. Co.* 10 Blatchf. 292.

(h) *Ry. Co. v. Ramsey*, 22 Wall. 322.

(i) *Holmes v. O. & C. R. Co.* 5 Fed. Rep. 75; *Keith v. Rockingham*, 2 Fed. Rep. 531.

(j) *City Bank v. Skelton*, 2 Blatchf. 26.

(k) *Cowles v. Mercer Co.* 7 Wall. 113; *Cunningham v. Ralls*, 1 Fed. Rep. 453.

(l) *Smith v. Railroad Co.* 99 U. S. 339. See *Perrons v. Lyman*, 5 Blatchf. 170; *Livingston v. Jefferson*, 1 Brock. 203; *Dennick v. Railroad Co.* 103 U. S. 11.

(m) *Benjamin v. Cavaroc*, 2 Woods, 168.

(n) *Hale v. Duncan*, 7 Cent. Law J. 146. See *West. U. Tel. Co. v. Atlantic & P. T. Co.* 7 Biss. 367.

(o) *Phelps v. O'Brien Co.* 2 Dill. 513.

(p) *The Argo*, 7 Ben. 301.

(q) *Malony v. City of Milwaukee*, 1 Fed. Rep. 611.

(r) *U. S. v. The Julia Lawrence*, synopsis of opinion, 6 Amer. Law Rev. 383, cited in full; *The L. W. Eaton*, 9 Ben. 291.

(s) *The L. W. Eaton*, 9 Ben. 239, denied.

NEW ORLEANS WATER-WORKS CO. v. ST. TAMMANY WATER-WORKS CO.  
and another.\*

(Circuit Court, E. D. Louisiana. September, 1882.)

1. JURISDICTION OF CIRCUIT COURT.

The circuit court of the United States has jurisdiction in a case where its correct decision depends on the construction of a section of the constitution of the United States.

*Railroad Co. v. Mississippi*, 102 U. S. 141, followed.

2. CORPORATIONS—EXCLUSIVE RIGHTS—IMPAIRMENT OF CONTRACT.

The complainant, the New Orleans Water-works Company, having been chartered, in 1877, by the legislature of Louisiana, the exclusive right and privilege was then conferred on said company of supplying the city of New Orleans with water by a system of public water-works. In 1879 a new constitution was adopted by the state, by which it was provided, in section 258, that "the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished." *Held*, that *quoad* the complainant's charter, the said constitutional provision was null and void, under section 10 of article 1 of the constitution of the United States, as impairing the obligations of the contract between the state and the complainant, as set forth in the latter's charter.

3. POLICE POWER.

Whenever any business, occupation, rights, franchises, or privileges become obnoxious to the public health, manners, or morals, they may be regulated by the police power of the state, even to suppression,—individual rights being compelled to give way for the benefit of the whole body politic; but when, in the exercise of the police power, private property or private vested rights must be taken for public use, in order to carry out, or allow to be carried out, improvements or regulations, or to carry on business or occupations, or schemes of public works, looking to the amelioration and benefit of the public health, manners, or morals, such private property, or private rights of property, must be entitled to the protection given by the constitution of the United States, and by that of the state of Louisiana, declaring that private property shall not "be taken for public use without just compensation," and "previously made."

Const. U. S. Fifth Amend.; Const. La. 1879, §§ 155, 156; *Crescent City, etc., Slaughter-house Co. v. Butchers' Union, etc., Slaughter-house Co.* 9 FED. REP. 743, affirmed.

In Equity. On application for an injunction *pendente lite*.

E. H. Farrar and J. R. Beckwith, for complainant.

G. L. Hall, T. L. Gill, and C. F. Buck, City Atty., for defendants.

PARDEE, C. J. The hearing is on the bill, exhibits, and affidavits.

The case as made shows—

That in March, 1878, and for years prior thereto, the city of New Orleans was the owner and in possession of a system of water-works for the supplying of the said city, and the houses and inhabitants thereof, with water, ac-

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.  
Affirmed. See 7 Sup. Ct. Rep. 405.

quired from the Commercial Bank of New Orleans under grants and legislation of the state giving the said city the necessary authority and privilege therefor exclusively forever.

That the said city was embarrassed in the financial management thereof, and was indebted therefor in the large sum of \$1,393,400, which indebtedness was represented by outstanding bonds issued by the city, running 40 years from date and bearing 5 per cent. per annum interest, known as the "water-works bonds."

That in 1877, in order to relieve the said city from its embarrassment growing out of its indebtedness, the legislature of the state of Louisiana, at an extra session held in that year, passed and adopted an act entitled "An act to enable the city of New Orleans to promote the public health; to afford greater security against fire by the establishment of a corporation to be called the New Orleans Water-works Company; to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of the city of New Orleans an adequate supply of pure and wholesome water, and to permit the holders of water-works to convert them into stock and to provide for the liquidation of the bonded and floating debt of the city of New Orleans."

That said act provided that a corporation be created, to be known as the New Orleans Water-works Company, and among other things provided that the holders of the "water-works bonds" might convert them into the capital stock of the said company, and that, when so converted, the said bonds should be surrendered and canceled; that there should be issued to the city of New Orleans stock amounting to the sum of \$606,600, in full-paid shares of stock, and an additional full-paid share of stock to every \$100 of the said "water-works bonds" which she had paid, taken up, or funded, and that for the purpose of carrying out the provisions of the act all of the certificates for all of the stock in the said company should be issued to the city of New Orleans; one set of certificates, equal in value and amount to the then outstanding par value and amount of the said "water-works bonds," being held by the city to be exchanged for the said bonds, with the holders thereof, and the other set of certificates being held by the said city in her own right and in trust for the holders of all her other bonded and floating indebtedness.

And that it was also provided in the said act that the said water-works company should be organized by the mayor of the city giving 30 days' notice that he should receive subscriptions of bondholders who may agree to exchange their said bonds for the stock aforesaid, and that the city should subscribe to the amount of her interest and the bonds redeemed or funded by her, as soon as the sum of \$500,000 in par value should have been subscribed by the holders of the water-works bonds, and the bonds surrendered and canceled as provided in the act, and that thereupon the company should be organized with a board of directors,—four to be appointed by the mayor of the city, and three to be appointed by the stockholders other than the city,

That all the conditions and provisions of said act were accepted and complied with by said city, and by the holders of said "water-works bonds," who made the subscriptions required by the act, in manner and form as required, so that on the ——— day of March, 1878, the said company was duly organ-

ized, and thereupon said company agreed to and accepted all of the conditions of the said act, as well as those of an amendatory act passed February 26, 1878, the provisions of which it is not necessary to recite, whereby the complainant became and was vested with corporate character, and with all the rights, and privileges granted by the said act No. 33, Ex. Sess. 1877, and the amendatory act thereto of 1878; and thereupon the city of New Orleans, as provided by the said acts, did by notarial act transfer, set over, and grant unto complainant all its rights, title, and interest in and to the water-works in said city, as it had acquired the same from the Commercial Bank of New Orleans, and all subsequent additions thereto.

That by reason of the premises the complainant became and was vested with full and absolute and complete title to all the said water-works, and to all the privileges acquired by the city of New Orleans from the Commercial Bank of New Orleans, and the exclusive right of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, and any other stream or river, by means of pipes or conduits, and the right of constructing any necessary works, engines, or machinery for that purpose, for the period of 50 years from and after March 31, 1877.

That the said act No. 33 of 1877, aforesaid, also conferred upon complainant the right to increase the capital stock of the corporation, and to borrow money for the purpose of improving and enlarging its works, etc., and for this latter purpose complainant was authorized to issue bonds of the company to an amount not exceeding \$2,000,000, and in such sums and on such terms as the complainant might determine, securing the same by mortgage on all the property and franchises of the complainant, acquired and to be acquired; but the said bonds were not to be issued nor disposed of except upon the consent and approval of the council of the city of New Orleans.

That for the purpose of enlarging and improving the water-works, and in compliance with said act, complainant has expended large sums of money, and has, with the consent and approval of the council of said city of New Orleans, made, issued, and disposed of a large amount of bonds, secured by mortgage on its franchises and works, and has received the proceeds thereof and devoted them to the enlargement and improvement of the works, to supply the said city and its inhabitants with water.

That complainant has in all things acted in good faith; that it accepted the terms and conditions of said act of the legislature only after having obtained the full consent of the city of New Orleans; that complainant supposed that it was obtaining the full and exclusive right and privilege of supplying the city of New Orleans with water by a system of public water-works, to the exclusion of all other companies, otherwise complainant would never have accepted the terms and provisions of the said act of the legislature.

That it was by reason of the exclusive right so as aforesaid granted that complainant was able to borrow money and negotiate the said bonds.

That in order to continue to comply with the terms of and provisions of said act, and make the water-works competent to an adequate supply of water in said city of New Orleans, complainant will be compelled to borrow large sums of money to be expended thereon; and that unless the exclusive rights and privileges of complainant are protected and preserved, complainant will



be absolutely without credit or means to borrow money or negotiate bonds to carry on the necessary enlargement and improvement of the water-works.

That by reason of the premises the city of New Orleans and the state of Louisiana became and were obligated in equity and good conscience to warrant, maintain, and protect complainant in the full right and exercise of its exclusive rights and privileges aforesaid, and that the obligations of a contract grew up and were created between the said state and city and complainant, which contract, it is claimed, was and is sacred under and by virtue of section 10 of article 1 of the constitution of the United States.

That the new constitution of the state of Louisiana, adopted in December, 1879, article 258, provides that "the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished."

That the defendant company has been lately incorporated under the general incorporation law of the state, with the avowed purpose of establishing a system of water-works to supply the city of New Orleans and the inhabitants thereof with water in competition with complainant, and are holding out and pretending that by virtue of said provision of the constitution of 1879, and of their act of incorporation, and the privileges they will obtain from the council of the city of New Orleans, they have full right and will establish a competing system of water-works in said city.

The defendant has obtained an act of Congress authorizing the laying of pipes and mains across Lake Pontchartrain, and has applied to the council of the city of New Orleans to pass ordinances giving the right to said defendant to establish competing water-works, and lay down in the streets of the city pipes and mains to that end.

That it is probable the members of the city council will collude with the said St. Tammany Water-works Company, and pass some ordinance or ordinances granting rights and privileges to said St. Tammany Water-works Company in conflict and in competition with the rights of complainant.

That the proceedings and pretensions of the defendant have already injured the complainant, and if continued will undoubtedly inflict irreparable damage.

The bill herein is filed to protect complainant's rights by enjoining the defendants from further action in the premises. As to the pending matter, the issuing of an injunction *pendente lite*, the case seems so narrow that counsel have argued but two questions, *i. e.*:

(1) Has the court jurisdiction? (2) Does the constitution of the United States, § 10, art. 1, protect the complainant against the repeal of the monopoly features of its charter, as declared in article 258 of the constitution of the state of Louisiana, adopted in 1879?

The statement of the second question seems to dispense with argument as to the first. No question could more clearly show "a matter in dispute, arising under the constitution of the United States." And in such a dispute original jurisdiction is given the

circuit courts of the United States by the act of March 3, 1875. The complainant has no case if the article 258 of the Louisiana constitution of 1879 has the force and effect that its terms import. The defendant, the St. Tammany Water-works Company, has no defense to the complainant's case unless article 258 of the Louisiana Constitution has the force and effect of repealing the exclusive features of complainant's charter. Said article undoubtedly has such force and effect, except in so far as it is in violation of the tenth section of article 1 of the constitution of the United States. Thus a question is at once raised as to the construction, force, and effect of an article of the federal constitution, and such question seems to be decisive of the issue between the parties.

The following propositions are declared by the supreme court to be now too firmly established to admit of or to require further discussion:

"That a case in law or equity consists of the right of one party as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. That cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted. That except in the cases of which this court is given by the constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct. That it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Railroad Co. v. Mississippi*, 102 U. S. 141.

It would seem, then, that the court has jurisdiction and will be called on to proceed with this case—to determine all issues of law and fact that may be raised therein. Ought an injunction to issue pending such determination? The showing made is to the effect that the proceedings of the defendants are very injurious to the complainant in depreciating its stock and bonds, and directly lowering, if not ruining, its credit, in hindering and obstructing complainant in carrying on and carrying out the extensive works and improvements it is charged with by the legislature of the state. Whether this is being done rightfully or wrongfully is the real issue in the case. The

*prima facie* showing is against its being rightfully done, and therefore there is a *prima facie* showing for the issuance of an injunction.

The learned counsel who have appeared for the St. Tammany Water-works Company have very ably and learnedly urged that the question of supplying the inhabitants of a great city with water was one arising under, and under the control of, the police power, and therefore could not be the subject of a contract within the protection of the federal constitution. This proposition may be taken for granted, so far as this case is concerned at this time, and yet not affect the matter before the court. There is no suggestion in this record that the police power of the state has been directed against the complainant, or that any portion of it has been delegated to the St. Tammany Water-works Company. So far as this record shows, or the court is advised, the last exercise of the police power of the state in relation to the supplying of water to the inhabitants of the city of New Orleans was when the sovereign in the state clothed the complainant with the powers, privileges, rights, and duties it is now asking the court to protect. Certainly it cannot be pretended that the last clause of article 258 of the state constitution has delegated anything in the way of inaugurating and maintaining public water-works in the city of New Orleans to the defendants.

In the *Slaughter-house Case*, decided at the November term of this court in 1881, reported in 9 FED. REP. 743,—a case identical in principle with this,—there had been a delegation of power to regulate slaughter-houses, etc., to the city authorities, (see article 248 of the Louisiana constitution of 1879,) and the city authorities had acted in the premises. In that case the same authorities (*Beer Co. v. Mass.* 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, Id. 677; *Stone v. Miss.* 101 U. S. 814) as are cited here were examined, and their inapplicability shown, and both the circuit judge and district judge, in separate opinions, decided in favor of the jurisdiction and of granting an injunction.

I am still disposed to adhere to that decision, and I regard the case under consideration as equally strong on the question of jurisdiction and much stronger on the facts. And here I desire to remark that there seems to me to be a great misapprehension as to the force and effect and proper exercise of the police power of a state. Its power and far-reaching effect may perhaps not be measured by general rules and definitions, and each case as it arises may have to be determined on its own particular facts and circumstances.

It seems, however, to be clear to me that regulations pertaining to the public health, manners, and morals come within its jurisdiction, and that, therefore, whenever any business, occupation, rights, franchises, or privileges become obnoxious to the public health, manners, or morals, they may be regulated even to suppression, individual rights being compelled to give way for the benefit of the whole body politic.

It seems equally clear to me that when, in the exercise of the police power, private property, or private or vested rights, must be taken for public use in order to carry out, or allow to be carried out, improvements and regulations, or to carry on business or occupations, or schemes of public works, looking to the amelioration and benefit of the public health, manners, or morals, such private property or private rights of property must be entitled to the protection given by the constitution of the United States declaring, "nor shall private property be taken for public use without just compensation," (see U. S. Const. Fifth Amend.,) and by articles 155 and 156 of the constitution of Louisiana, declaring—

Art. 155. "No *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed, *nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made.*"

Art. 156. "Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

All property of corporations or individuals is owned subject to the proper exercise of the police power. If my lot of ground is needed for a public hospital or jail, no doubt I am entitled to compensation before it can be taken from me. If my vested rights are needed to supply the city of New Orleans with pure water, must I not likewise be compensated?

The arguments usually addressed to the courts in cases like the one under consideration are generally based on the assumption that the sovereign, in exercising the police power of the state, is absolutely unfettered with regard to all the rights of individuals and all the rights of property. I am not prepared to take this advanced ground, and therefore, having jurisdiction, I feel compelled to enjoin the St. Tammany Water-works Company from further proceedings necessarily resulting in the confiscation or appropriation without compensation of the vested rights of the New Orleans Water-works Company.

So far as the city of New Orleans is concerned, although the city attorney has entered an appearance for her, no steps have been taken in her behalf as against complainant, and a decree *pro confesso* has been entered. Although from the showing made by complainant it

would seem probable that some members of the city council are disposed to act with the St. Tammany Water-works Company in depreciating the stock and bonds of complainant, and in hindering the performance of the works and duties devolving on complainant, yet it hardly seems probable that such adverse action can be secured from the city government. Considering the very large interest the city owns directly in the stock and property of the New Orleans Water-works Company, and particularly in view of the fact that as the city of New Orleans is the vendor and warrantor of the property, rights, and privileges she transferred to the water-works company, and was and is the chief beneficiary in the financial schemes provided by the legislature by which she was relieved of an oppressive bonded debt, any successful adverse action on her part would subject her, in equity and good conscience, to the payment of every dollar of the original "water-works bonded debt," and perhaps also to the payment of all the bonds and paid stock of the water-works company.

It would thus seem that in this controversy both individual interest and good faith would control the city's action. At all events, the restraint by injunction of the legislative action of a corporation is of doubtful propriety, and I am indisposed to grant such order; particularly so when complainant will lose no substantial advantage thereby, as an injunction can readily issue as soon as legislation takes any form susceptible of execution. That any rights of the defendant the St. Tammany Water-works Company may be saved, the complainant will give adequate security.

Let an injunction issue as prayed for against the St. Tammany Water-works Company, on complainant's giving bond in the sum of \$20,000, with good and solvent security, conditioned to repay all damages resulting to the defendants from the issuance of said injunction, should it be hereafter determined in this court, or on appeal, that said injunction was wrongfully or improvidently issued.

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**JURISDICTION OF CIRCUIT COURT.** For the judicial power to extend to a violation of the constitution, it must be a case in law or in equity.(a) It is the final arbiter of constitutional construction, and may receive from the legislature the power to construe every constitutional law.(b) The act must be clearly subversive of the constitution,(c)—a clear violation,(d)—and the objec-

(a) *Cohens v. Virginia*, 6 Wheat 264. See *Rail-road Co. v. Mississippi*, 102 U. S. 133.

(b) *Van Horne v. Dorrance*, 2 Dall. 304; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6

Wheat. 264; *Ableman v. Booth*, 21 How. 506; S. C. 3 Wis. 1; *Mayor v. Cooper*, 6 Wall. 247.

(c) *Turner v. Athans*, 6 Neb. 54.

(d) *Central C. R. Co. v. Twenty-third St. R. Co.* 54 How. Pr. 168; *Bennington v. Park*, 50 Vt. 178.

tion must not be doubtful.(e) It extends over statutes, whether passed by a state legislature or by congress, which are claimed to be in contravention of the constitution of the United States.(f) So the circuit court has jurisdiction of a suit arising under a state law violating the obligations of a contract;(g) but not to statutes claimed to be void under a state constitution.(h)

**VESTED RIGHTS.** A right is vested when it has already become a title, legal or equitable,(i) and the legislature has no power to divest titles(j) or legal or equitable rights previously vested,(k) nor to vest them in another.(l) Even if rights have grown up under a law of somewhat ambiguous meaning, the legislature cannot interfere with them;(m) but a statute is not objectionable because it purports to operate on prior, contingent, or qualified rights.(n) So, if an act of the legislature is within the legislative power, it is not a valid objection to it that it divests vested rights. Such an act is not within the constitutional prohibition, however repugnant it may be to the principles of sound legislation.(o) If a right be impaired by a subsequent statute, the law is void;(p) but the repeal of a statute before a party has taken all the steps necessary to give him a right under it, does not impair the right.(q) A corporation may be private, and yet the charter may contain provisions of a purely public character.(r) An act which impairs the charter by enlarging the powers of the state over the body corporate, or by abridging the franchise, or by altering the charter, is void.(s) The legislature may make a failure to comply with police regulations a ground for forfeiture of a charter,(t) and the provisions of its charter cannot exempt it or its officers from regulations made in the exercise of police powers of a state;(u) but it cannot subject a corporation to forfeiture of its franchise for any cause not sufficient when such corporation was created.(v)

**POLICE POWERS OF STATE.** The police powers comprehend all those general laws of internal regulation necessary to secure peace, good order, health, and the comfort of society.(w) It extends to the protection of the lives, limbs, health, comfort, morals, and quiet of all persons, and the protection of all property in the state.(x) Congress cannot legislate on the internal police of a state;(y) the power of the state over police regulations being supreme.(z)

(e) *U. S. v. Jackson*, 3 Sawy. 62; *People v. Brinkerhoff*, 63 N. Y. 259.

(f) *Calder v. Bull*, 3 Dall. 399; *Marbury v. Madison*, 1 Cranch, 137; *Dartmouth Coll. v. Woodward*, 4 Wheat. 625.

(g) *State Lottery Co. v. Fitzpatrick*, 3 Wood, 222.

(h) *Calder v. Bull*, 3 Dall. 399.

(i) *Richardson v. Aiken*, 87 Ill. 133.

(j) *Helm v. Webster*, 85 Ill. 113.

(k) *Bunn v. Morrison*, 5 Ark. 217; *Grigsom v. Hill*, 17 Ark. 489.

(l) *Koenig v. Omaha, etc.*, R. Co. 3 Neb. 333.

(m) *McLeod v. Burroughs*, 9 Ga. 213.

(n) *Clarke v. McCreary*, 40 Miss. 347.

(o) *Lane v. Nelson*, 79 Pa. St. 407.

(p) *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Van Hoffman v. Quincy*, 4 Wall. 535.

(q) *Van Horne v. Dorrance*, 2 Dall. 304; *Mobile R. Co. v. State*, 29 Ala. 573; *Brinsfield v. Carter*,

2 Ga. 143; *Wise v. Rogers*, 24 Gratt. 169; *Huntsman v. Randolph*, 5 Hayw. 263; *State v. Gray*, 4 Wis. 350.

(r) *Regents v. Williams*, 9 Gill. & J. 365.

(s) *Philadelphia, etc., R. Co. v. Bowers*, 4 Houst. 506; *Commercial Bank v. State*, 14 Miss. 439.

(t) *State v. S. P. R. Co.* 24 Tex. 80.

(u) *Cummings v. Spannhorst*, 5 Mo. Ct. Ap. 21

(v) *State v. Tombeckbee Bank*, 2 Stew. 30.

(w) *Ex parte Shrader*, 33 Cal. 279; *Philadelphia, etc., R. Co. v. Bowers*, 4 Houst. 506; *Beer Co. v. Massachusetts*, 97 U. S. 25.

(x) *Munn v. Illinois*, 94 U. S. 147; *Toledo, etc., Co. v. Jacksonville*, 67 Ill. 37; *Ex parte Shrader*, 33 Cal. 279; *Davis v. Central R. Co.* 17 Ga. 323.

(y) *Gibbons v. Ogden*, 9 Wheat. 203; *U. S. v. De Witt*, 39 Wall. 41; *Slaughter-house Cases*, 16 Wall. 36; *Railroad Co. v. Fuller*, 17 Wall. 560.

(z) *Slaughter-house Cases*, 16 Wall. 62; *Bartemeyer v. Iowa*, 18 Wall. 133.

Every citizen holds his property subservient to such police regulation as the legislature in its wisdom may enact for the general welfare,(a) and private interests must be made subservient to the general interest of the community.(b) When applied to corporations the police power is subject to constitutional limitations, and it cannot conflict with a charter;(c) but provisions for penalties and forfeitures in a charter are not mere matters of contract.(d) It is the province of the legislature to determine the exigency calling for the exercise of police powers, and of the courts to decide the proper subjects of its exercise,(e) and it cannot, by any contract, divest itself of this power,(f) nor of its discretion in its exercise.(g)—[ED.]

(a) *Brown v. Keener*, 74 N. C. 714; *Pool v. Trexler*, 76 N. C. 297.

(b) *Slaughter-house Cases*, 16 Wall. 62; *Com. v. Alger*, 7 Cush. 84; *Taunton v. Taylor*, 116 Mass. 254; *Watertown v. Mayo*, 109 Mass. 315.

(c) *Lake View v. Rose Hill Cemetery*, 70 Ill. 191; *State v. Fosdick*, 21 La. Ann. 256.

(d) *State v. Railroad Co.* 3 How. 534; 12 Gill. & J. 399.

(e) *Lake View v. Rose Hill Cemetery*, 70 Ill. 191; *Daniels v. Hilgard*, 77 Ill. 640.

(f) *Beer Co. v. Massachusetts*, 97 U. S. 25.

(g) *Boyd v. Alabama*, 94 U. S. 645; *Beer Co. v. Massachusetts*, 97 U. S. 25.

## COQUARD v. CHARITON COUNTY.

(*Circuit Court, W. D. Missouri, W. D. 1882*)

### 1. POWERS—WHEN CANNOT BE DELEGATED.

Whenever trusts or discretionary powers are to be exercised, the exercise thereof cannot be delegated.

### 2. COUNTY INDEBTEDNESS—POWERS VESTED IN COUNTY COURTS.

Where the legislature has intrusted the county courts and judges thereof with the settlement and compromise of the bonded indebtedness of their counties, they cannot divest themselves of these trusts and delegate them to another.

### 3. SAME—CANNOT BE DELEGATED.

A county court has no power to enter into a contract with a citizen of the state, delegating to such citizen the power and authority to compromise the outstanding indebtedness of such county, and give to such citizen the exclusive right to deal with the bondholders of the bonds of such county as its agent in effecting such compromise.

*Fisher & Rowell and Botsford & Williams*, for plaintiff.

*Dobson & Bell*, for defendant.

KREKEL, D. J. Plaintiff, Coquard, a citizen of the state of Illinois, sues Chariton county, one of the counties of the state of Missouri, on the following contract:

"This agreement, made and entered into by and between the county of Chariton, in the state of Missouri, party of the first part, and Louis A. Coquard, of the city of St. Louis, party of the second part, witnesseth that for and in consideration of the services rendered and to be rendered by the party of the second part in and about the compromising the debt now outstanding of said

party of the first part, and in consideration that said party of the second part has agreed to use due diligence and his best endeavors in effecting such compromise for the space of one year from the date hereof, party of the first part agrees that party of the second part shall be its agent for the purpose of negotiating and effecting a compromise of its indebtedness for the said space of one year, and that for that time it will employ no other agent, and give party of the second part the exclusive right to deal with the bondholders of the bonds of said county as its agent in effecting such compromise; that party of the first part will refer all letters of inquiry or inquiries of any kind about said indebtedness, or in compromising the same, to party of the second part. Said party of the second part shall make no charges against said county for his services in effecting such compromise; but the party of the first part will pay party of the second part ninety-five (95) cents on the dollar of the principal and past-due interest for each of the bonds known as the Chillicothe and Brunswick issue of said county, delivered to party of the first part by party of the second part during said time, and eighty (80) cents on the dollar of the principal and past-due interest for each of the bonds known as the Missouri and Mississippi issue, delivered to party of the first part by party of the second part within said time, which payments are to be made in new 6 per cent. compromised bonds of said county, duly executed. And party of the second part shall have for his compensation the difference between the amount he can obtain said bonds for from the holders, and the amount above specified.

"J. B. HYDE, President Chariton County Court.

"L. A. COQUARD.

"October 20, 1879."

The petition is in the usual form, the various counts setting out the particular debts compromised, claiming the several amounts to which plaintiff supposes he is entitled under the contract for his services. To this petition defendant, by its attorneys, files a demurrer, assigning, among other causes, want of power in the county court of Chariton county to make the contract. It appears that the legislature of the state of Missouri, in order to enable the indebted counties of the state to settle and compromise their bonded indebtedness, passed sundry acts having that object in view. It is claimed by the plaintiff that under one of these acts, namely, that of April 12, 1877, county courts of indebted counties have power to make the contract sued on. The act cited in its first section authorizes counties, townships, cities, and towns, through the county courts, either for the counties themselves or for any township, or by the proper authorities of cities or towns, to enter into contracts with any person or persons, corporations or associations, for the compromise, purchase, or redemption of all bonds and coupons, whether due or not due, including judgments, and provides for the issuing of new bonds to be used in such compromises. It is not claimed that the act in any of its



provisions gives direct authority to county courts to employ agents to effect the compromises authorized, but the argument is that under this law, when viewed in connection with the acts of 1875 and 1879 upon the same subject, such authority may be inferred. Moreover, it is contended that from the nature of the business to be transacted, and the unsuitableness of the county courts themselves to attend to it, it is reasonable to suppose the employment of agents was contemplated, and hence the law should be so construed as to allow it. On looking into the act of 1875 it is found that the governor of the state is authorized to appoint a general municipal agent, who is empowered to receive propositions from the indebted municipalities regarding the terms upon which they will settle, and to ascertain from the bondholders upon what terms they will accept new bonds. The fifth section of the act provides for a vote by the people of the indebted county on compromises, and authorizes the county court to appoint an agent, who is to report to the general state agent the terms upon which it is proposed to settle.

The acts of 1879 are enlargements of former acts on the subject of compromises, and no agencies are therein provided for except in the county and township act of May the 16th, which directs the treasurers to be appointed as agents for a specified purpose. The various acts cited, and all laws bearing upon the subject under consideration, must be read in connection with the forty-eighth section of the fourth article of the present constitution of Missouri, if we attempt to arrive at and be guided by legislative intent. That section, among other things, prohibits the legislature from passing any act authorizing counties or municipalities passing any claims "under an agreement or contract made without express authority of law," and declares such unauthorized agreements or contracts as null and void. The county courts of Missouri are charged with the control and management of county property, the assessment, levying, and collection of taxes, laying out roads and keeping them in repair, and the transaction of county business generally. It is not denied that the county court may employ agents when required in performance of the duties imposed on them under the law. Nothing can be gathered, however, from the laws referred to, nor the general scope of the legislation of Missouri, indicating that county courts have power to divest themselves of any of the trusts imposed on them for a definite or indefinite time, and that is really the question here. Could the judges of the county court of Chariton county make a contract by which they divested themselves of the power to compromise the bonded indebtedness of the county, and delegate that power for the time of one year

to the plaintiff? It may be taken as well-established law that whenever trusts or discretionary powers are to be exercised, the exercise thereof cannot be delegated. *In re Quong Woo*, 13 FED. REP. 229; Dill. Mun. Corp. § 61; 43 Mo. 352; 48 Mo. 167; 61 Mo. 237, 232.

The judges of the county court of Chariton county, in common with other county courts of the state, were selected by the voters under provisions of law. The legislature of Missouri has intrusted to these courts and the judges thereof the settlement and compromise of the bonded indebtedness of their counties. The county court of Chariton county, by the contract sued on, undertook to divest themselves of these high trusts, and delegate them to the plaintiff. This cannot be done without express authority of law. Public policy would seem to be equally adverse to the entering into of such a contract as the one under consideration. The county court thereby deprived itself of the means of making favorable settlement and compromises should opportunities occur, placing all such chances in the hands of a person who, on his part, assumes no responsibility whatever, but making it his interest to depress the credit of the county to the injury of the people thereof, that he, and not the county, may profit thereby. When such contracts are made by individuals, and the law is invoked, courts will look with a critical eye at them, and allow no fruits to be reaped therefrom except by compulsion, as it were. Parties will not be permitted to take advantage of such contracts when the interest of the public is concerned. It is unnecessary to speak of the opportunities for fraud such contracts afford, for the county court of Chariton county is not charged with any intentional wrong, nor is the defendant such a manipulator of public securities as could seriously affect the market value of Chariton county bonds to his advantage. Both for want of power in the county court to make the contract under consideration, as well as on the ground of public policy, it is held that the plaintiff has no cause of action on the instrument in suit. The demurrer to the petition is therefore sustained.

Judge McCrary concurs.

## CASTELLO v. CASTELLO and others.

*(Circuit Court, W. D. Missouri. October Term, 1882.)*

1. PRACTICE—SERVICE ON PARTIES NON-RESIDENT—ACT OF CONGRESS, MARCH 3, 1875, § 8.

The eighth section of the act of congress of March 3, 1875, authorizes the bringing in of parties to a suit who are *non-residents* of the district where the suit is brought, by service of an order of the court, as therein provided.

2. SAME—"CLOUD ON TITLE"—EQUITABLE RELIEF—JURISDICTION.

When a complainant alleges in her bill that she was fraudulently induced to execute an agreement to receive less than her lawful share of her husband's estate, and that the estate is being divided according to such fraudulent agreement instead of being distributed in accordance with the laws of the state where it is being administered, the suit must be considered as instituted "to remove a cloud upon title to personal property," within the meaning of section 8 of the act of March 3, 1875, and as calling for equitable relief within the jurisdiction of the United States circuit court.

*Cowan & French*, for complainant.

*James Scammon*, for defendants.

KREKEL, D. J. Complainant, a citizen of the state of Kansas, brings her bill against William H. and Charles L. Castello, citizens of the state of Illinois, Mary E. Hickok and Franklin Hickok, her husband, and George N. Nolan, public administrator of Jackson county, Missouri, the three last-named defendants being residents of the state of Missouri, setting forth that plaintiff was the wife of James O. Castello; that after their marriage they moved to and resided in Kansas City, Missouri, where her husband, in July, 1881, died intestate; that soon after his death his brothers and sister attempted to take possession of his estate, and to protect it she had the public administrator of Jackson county, Missouri, take charge of the same; that afterwards said brothers and sister, under the pretense of making a settlement and compromise with her, and paying her for the interest she had in her husband's estate, by deceit and fraud induced her to sign an instrument of writing reciting that she had agreed to take one-fourth of her husband's estate; that said agreement has been filed in the probate court of Jackson county, which is now administering the estate; and that it is insisted by the defendants that the distribution thereof shall be made in conformity to said fraudulent agreement, instead of the laws of the state of Missouri.

The public administrator, Nolan, is made a party, and asked to be enjoined from paying over, so that complainant's estate may be preserved. She prays for the setting aside and annulling of the

instrument referred to, so that the probate court having in charge the estate may be free to distribute the same according to law, and for general relief. As to two of the defendants, William H. and Charles L. Castello, inhabitants of the state of Illinois, an affidavit as to their non-residence in this district is filed, with prayer that an order for personal service on them in Illinois be made as authorized by the eighth section of the act of congress of the third of March, 1875. The Illinois defendants appear by attorney and file their motion to set aside the order made by the court, directing them to be served, as improvidently made. The remaining defendants file their demurrer to the bill. The motion to set aside the order of service, and the demurrers, are the matters to be determined.

In support of the motions to set aside the order of service, the ground is taken that the act of congress cited does not authorize the bringing in of parties non-residents of the district in which the suit is brought; that the court can get jurisdiction only by seizure of property or personal service in the district. The eighth section of the act of congress cited provides—

“That when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or remove any incumbrance or lien or cloud upon, the title to real estate or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person in possession or charge of said property, if any there be.”

Similar provisions for personal service on defendants outside of the territorial jurisdiction of the court are found in the statutes of Missouri, sections 3494 and 3501. The provisions of the act of congress differ from the Missouri act in some particulars, but to whatever the law of congress extends, the provisions thereof are broader in their application to the subjects which may be litigated, as we shall hereafter see, on considering the demurrers. In support of the view by counsel regarding obtaining jurisdiction, admiralty services, and decisions of courts regarding such, are cited and relied on. Admiralty proceedings are based upon the law that the thing seized is the defendant in the action,—the responsible party, so to speak,—and all notices are general, and not directed to any person except those in possession, who are notified that the property has been seized. The service provided in the act of congress of 1875 must be

taken to be a service enabling the court to fully deal with the parties and their rights pertaining to the subject-matter of the litigation.

The question as to whether, under the act of congress, viewed in connection with the Missouri act adopted in practice, there should be served with the order a copy of the writ and petition, as provided in the Missouri statute, it is not necessary to determine, as the parties have appeared and filed motions; but it may be remarked that such additional service is to be preferred, as it gives the party full notice as to what he is to defend.

The motion to set aside the order of service is overruled.

The demurrers of defendants to the bill remain to be considered. The demurrer takes the ground that the court cannot grant the relief asked—*First*, for the want of power in the court over the subject-matter; *next*, for want of equity in the bill. Section 8 of the act of congress cited provides for the removal of any "lien or cloud upon the title to real or personal property within the district where such suit is brought." It is argued that there can be no lien or cloud upon the title to property in this case, because there is no property described in the bill, and no decree could be rendered without. This attempted subdivision of the subject-matter in litigation for the purpose of trying the parts, is of no avail. Looking at the object of the bill it mainly seeks to remove a lien or cloud upon her interest in the estate and property of her husband. That this estate passed into the hands of the public administrator, and may have been by him converted into money before this time, can make no difference. The question is, is she entitled to a different share or part of the estate and property of her husband than is provided for in the instrument of writing under which defendants claim, and which she alleges was obtained by deceit and fraud. The jurisdiction over questions of this kind by the courts of the United States, when invoked by a distributee and citizen of another state, has been determined by the supreme court in *Payne v. Hook*, 7 Wall. 425, and decisions since.

The instrument sought to be set aside may, with no great impropriety, be called a lien upon the amount for final distribution of the estate of James O. Castello, for the defendants assert their title to the proceeds under it. At any rate, it is a cloud upon her title as long as it stands and is made the basis of claims adverse to her interest. The equity of the bill, assuming the allegation thereof to be true, as the demurrers admit, can hardly be questioned. Here is the

wife of a husband whose estate would descend to her, and the brothers and sister of the deceased, there being no will. By deceitful practices and frauds she is induced to sign an instrument depriving her largely of her legal interest. The very statement of the matter calls for interference and redress. Scarcely an object for more proper interference on the part of a court of equity could be conceived of. It should be done in time, before the estate has taken wings and found its way into the possession of wrongful claimants. The administration of the estate in the probate court is not asked to be interfered with, but the way for its proper action is to be cleared, which might have been done by appearing in the court having the estate in charge, but which a non-resident has a right to have done in the courts of the United States.

The demurrers will be overruled.

Judge McCrory concurs.

**NON-RESIDENTS—AS PARTIES.** By section 8 of the act of congress of March 3, 1875, a federal court acquires jurisdiction over parties only by service of process, or by their voluntary appearance,<sup>(a)</sup> and only by service of process within the district,<sup>(b)</sup> and not then if he is but temporarily within the district.<sup>(c)</sup> A person who comes within the district merely for the purpose of attending a trial in a state court, cannot be served with process issuing out of a United States court;<sup>(d)</sup> and if served with summons while attending the trial of a cause in the circuit court as a party, the service will be set aside.<sup>(e)</sup> Where defendant, not an inhabitant of the district, is inveigled or enticed into the district by false representations or deceptive contrivances, service of process on him within the district is illegal.<sup>(f)</sup> If a non-resident comes into the district for the purpose of pleading to an indictment and giving bail, he cannot be sued before he has a reasonable time to depart.<sup>(g)</sup> If defendant is a non-resident of the district, the record must show with certainty that process was served upon him within the district.<sup>(h)</sup> Where one joint defendant removed the suit, plaintiff is entitled to process against the defendant who was not served with process in the state court at the time the cause was removed.<sup>(i)</sup> If necessary parties are non-residents, their appearance may be secured under the provision of this section, where there is property within the

(a) Herndon v. Ridgway, 17 How. 424; Stevens v. Richardson, 9 Fed. Rep. 191.

(b) Allen v. Blunt, 1 Blatchf. 480; Union Sugar Ref. v. Mathiesson, 2 Cliff. 304.

(c) Smith v. Tuttle, 5 Biss 159.

(d) Juneau Bank v. McSpeden, 5 Piss. 64; Parker v. Hotchkiss, 1 Wall. Jr. 269; Brooks v. Farwell, 4 Fed. Rep. 166.

(e) Parker v. Hotchkiss, 1 Wall. Jr. 269. *Contra*, Blight v. Fisher, Pet. C. C. 41.

(f) Steiger v. Bonn, 4 Fed. Rep. 17; Union Sugar Ref. v. Mathiesson, 2 Cliff. 304.

(g) U. S. v. Bridgman, 8 Am. Law. Rec. 541.

(h) Allen v. Blunt, 1 Blatchf. 480; Vore v. Fowler, 2 Bond, 294; McCloskey v. Cobb, Id. 15; Thayer v. Wales, 5 Fisher, 448.

(i) Fallis v. McArthur, 1 Bond, 100. *Contra*, Field v. Lowndale, Deady, 228. See Fisk v. Union Pac. R. Co. 8 Blatchf. 243; 6 Blatchf. 352.

jurisdiction upon which a lien is claimed.(j) A marshal's return of "not found," is not a condition precedent to the making of the order contemplated by this section; such order may be made on affidavit alone.(k) The circuit court cannot enforce the lien until it has jurisdiction of the person.(l) This provision is not a denial of jurisdiction, but the grant of a privilege to defendant not to be sued out of the state where he resides unless served with process, or waives his privilege by voluntary appearance.(m) The successor in a deed of trust is a proper party defendant in a suit to adjudge the deed a subsisting lien, and he may be brought before the court under this section.(n) The circuit court has jurisdiction to adjudicate upon the claims of parties not found within the district, if they have been notified by service or by publication of the pendency of the suit.(o) Foreign corporations are found within the district when process is served upon their duly-constituted agent in charge of their business.(p)—[Ed.]

(j) *Mercantile Trust Co. v. Portland & O. R. Co.* 10 Fed. Rep. 604.

(k) *Forsyth v. Pierson*, 9 Fed. Rep. 801; *Woolridge v. McKenna*, 8 Fed. Rep. 650.

(l) *Ins. Co. v. Bangs*, 103 U. S. 435.

(m) *Harrison v. Rowan*, Pet. C. C. 469; *Segee v. Thomas*, 3 Blatchf. 11.

(n) *Mass. Mut. L. Ins. Co. v. Chicago & A. R. Co.* 13 Fed. Rep. 857.

(o) *Goodman v. Niblack*, 102 U. S. 556.

(p) *McCoy v. C., I., St. L. & C. R. Co.* 13 Fed. Rep. 3; *Mohr v. Mohr* Dist. Co. 12 Fed. Rep. 474.

## BEECHER, Ex'x, etc., v. CHICAGO & N. W. R. Co.

(Circuit Court, N. D. Illinois. November 20, 1882.)

### 1. LAND GRANT IN AID OF RAILROADS.

Certain lands were granted by congress to a state to aid in the construction of railroads, and by the state were granted to a certain railroad company, which mortgaged the same, and defendant became the purchaser at the foreclosure sale. *Held*, that the conditions upon which the land had been granted by congress not having been complied with, the title still remained in the United States.

### 2. SAME—LANDS HELD IN TRUST—LIABILITY FOR WASTE.

Where defendant agreed that the lands should be devoted to the payment of certain indebtedness of the railroad company to which the land had been granted by the state, and executed and delivered to the bondholders representing such indebtedness "convertible land certificates," which were made assignable, it held the equitable title as trustee, and was not liable for waste in the removal of valuable timber therefrom, unless actually received and used by it. The beneficiaries under the trust had the power to protect their own interests.

*John M. Jewett*, for complainant.

*B. C. Cook*, for defendant.

**DRUMMOND, C. J.** The bill in this case is founded on the theory that the defendant was the trustee for a series of years of certain timber lands in Wisconsin, the chief value of which at the time consisted

in the timber growing upon them, and that it was the duty of the defendant, as such trustee, to exercise reasonable diligence in preserving the timber and preventing waste, and that was not done.

It was also founded on the allegation that the defendant directly permitted timber to be cut. The lands were granted in 1856 by congress to the state of Wisconsin for the purpose of aiding in the construction of railroads in that state. The state granted some of them to a railroad company, which had mortgaged them to secure a certain indebtedness, and upon foreclosure proceedings under the mortgage the lands were transferred to the defendant, a corporation created by the laws of Wisconsin and Illinois. The defendant agreed that the land should be devoted to the payment of certain indebtedness of the railroad company, to which the land had been granted by the state. This arrangement was completed in 1859. At that time the conditions upon which the land had been granted by congress not having been complied with, the title still remained in the United States, and therefore a good title could not be made to those who represented the indebtedness of the railroad company already mentioned. In consequence of this, the defendant executed and delivered to the bondholders representing that indebtedness what were denominated "convertible land-grant certificates," which set forth that the defendant held the lands by virtue of the laws of Wisconsin, and "certified" that after the first day of July, 1860, the holders of these bonds were entitled, on presentation of the certificates, to a deed for a proportionate share of the land, in accordance with the legal subdivisions which the defendant might receive on the completion of that portion of the railroad referred to in the acts and grants, in the proportions named in the certificates. These certificates were delivered to the bondholders upon the surrender of the bonds held by them. They were assignable, and the plaintiff's testator acquired a large amount of them. While the lands were thus held by the defendant, the most valuable part of the pine timber standing upon them, at the date of the certificates and at the time the title was acquired by the railroad company, (1861,) was cut off and removed. In 1868 the legislature of Wisconsin authorized the defendant to take proceedings in any circuit court of the state for a partition of the lands among the holders of the certificates, and under the authority of this statute proceedings were instituted in the circuit court of Milwaukee county. The certificate-holders did not appear. Publication was made, defaults entered, reference was made, and the referee reported that it was impracticable to partition the land among the various certificate-hold-



ers, and a sale was ordered. In the decree of sale provision was made that the certificates might be used in the purchase of land, upon certain terms. At these sales, made under the order of the court, the lands were all sold. The plaintiff's testator was a purchaser of lands at the sale.

The main question in the case is whether the defendant is liable for the timber cut down and removed from the lands; and if so, what is the nature and extent of its liability. There seems to be no question made by the defendant growing out of the consolidated character of the corporation under the laws of Wisconsin and Illinois, or that the subject-matter of this controversy relates to lands held in trust in the former state. I do not think that the general theory upon which the bill is framed can be maintained, that is, because the lands were held by the defendant under the circumstances named, for a particular purpose, the defendant was obliged to protect them from trespasses and waste. The plaintiff was one of the beneficiaries under the trust, and under the laws of Wisconsin he undoubtedly had a right to take the proceedings necessary to protect the land in which he had an interest from the depredations of trespassers. But the defendant was a mere naked trustee for the purposes named, even if the title was acquired from the United States and vested in the company in 1861. Before the proceedings in partition took place under the special act of the legislature which has been referred to, it was competent for the plaintiff's testator to take all proper measures under the laws of Wisconsin for the protection of his interest, and I apprehend it was not material whether the other beneficiaries did or did not join in such action. It may be very questionable, I think, whether the demand which it is claimed was made on Mr. Ogden in New York, was of such a character as to require the performance of any affirmative action on the part of the defendant. The convertible land-grant certificates which were issued, declared that the holders of the bonds were entitled on presentation of the certificates to a deed for a proportionate share of land in accordance with certain principles therein stated. It would seem that a more formal demand than that referred to in the testimony of Mr. Beecher was necessary in order to put the defendant in default on non-compliance with such demand. It certainly was more obligatory on the plaintiff's testator and the beneficiaries under the trust to look after their interests in these lands, and to guard against waste and trespasses, than on the defendant. Besides, the beneficiaries provided no fund out of which the defendant should be paid for any expenditures that might be incurred.

But, although this may be so, still I think there are certain facts which, it is claimed by the plaintiff, are established by the evidence, which, if true, may entitle her to relief, independent of the view already stated by the court. It is said, and there is proof tending to show that the defendant received a part of the proceeds of the sales of timber, and that some of the timber which was taken from the land thus held in trust was used by the defendant. Wherever the proceeds of the timber taken from the land can be traced into the hands of the defendant, or wherever timber cut from the land has been used by the defendant, it ought to account to the equitable owners of the land; and so the plaintiff may be entitled to her share to that extent and no further.

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OGLESBY and others v. ATTRILL.

(Circuit Court, E. D. Louisiana. February, 1882.)

1. EQUITY PLEADING AND PRACTICE—AMENDMENTS.

If an amendment have the effect of making a new case, or if it makes a case inconsistent with the position of the complainants in the suit at law where they are seeking a new trial, a motion to take such amendment from the files is a proper one, and will be allowed.

2. SUBSTITUTED SERVICE.

There can be no doubt of the propriety of substituted service when a bill is brought to obtain a new trial of a cause at law in the same court.

*Minnesota v. St. Paul*, 2 Wall. 633.

3. REVIEW BY ANOTHER CIRCUIT JUDGE.

A decision in a case rendered by one judge of a circuit court is not open for review by any other judge sitting in the same court and in the same case.

*Cole Silver Min. Co v. Virginia, etc., Co.* 1 Sawy. 685, 689.

Motion to take Amended Bill from the Files.

*Richard De Gray, Robert Mott, and Henry B. Kelly*, for complainants.

*Thomas J. Semmes*, for defendant.

PARDEE, C. J. The original bill, in its widest scope, is a bill to impeach a judgment rendered at law, and to procure a new trial in the case where the judgment was rendered. It was only for such a bill that substituted service was ordered by the court. It is only for such a bill that the defendant is before the court.

Under leave obtained from the court complainants have amended their bill by setting up matters not pertinent to the question of a

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

new trial or to the impeachment of the judgment rendered, but tending to charge the defendant, as trustee for the complainants, for a large amount of gas stock, the sale of which constituted the cause of action in the case at law wherein the new trial is sought.

Counsel for defendant moves to take the amendment from the files on the grounds (1) of the limited appearance of the defendant, and the limited jurisdiction of the court over the defendant; (2) because the amendment makes a new case. The motion is a proper one, (see 1 Daniell, Ch. 426,) and I think the last ground well taken. The first clause of amendment made can have no effect unless it be to charge the defendant as trustee, and to give it that effect would be to make a new case. Besides, an inspection of the record shows that it makes a case inconsistent with the position of complainants in the suit at law, where they are seeking a new trial. In that case they sued for damages growing out of the alleged fraudulent sale of the gas stock, which to that extent was an affirmance of the sale. *Miller v. Barber*, 66 N. Y. 564. See *Stevenson v. Newnham*, 76 E. C. L. 297.

Solicitor for defendant also moves the court that the substituted service of process heretofore made in this case be set aside and annulled. I have examined the record, and I find that this question has been passed upon and adjudicated by the district judge sitting in this court in the early stage of this case. 12 FED. REP. 227. This decision is not open for review to any other judge sitting in this court in the same case. See *Cole Silver Min. Co. v. Virginia, etc., Co.* 1 Sawy. 685, 689. Besides, the decision seems to be well supported by the language of the supreme court in the case of *Minnesota v. St. Paul*, 2 Wall. 633, where it is said:

"Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were party to the judgment at law."

If this be the practice where a bill is brought to enjoin a judgment, what doubt can there be as to the propriety of substituted service when a bill is brought to obtain a new trial of a cause at law in the same court?

It seems to me that the motion of defendant to take the amendment from the files, should be allowed so far as the first clause of complain-

ants' amendment of date January 2, 1882, is concerned, and that otherwise the amendment may stand; the defendant to plead, answer, or demur on or before the rule-day in March; the complainants to pay the costs of this rule. And it is so ordered.

### FITZPATRICK and others v. DOMINGO.\*

(Circuit Court, E. D. Louisiana. November, 1882.)

#### 1. REVIVOR.

The revivor of a suit in equity by or against the representative of a deceased party, is a matter of right and a mere continuation of the original suit.

*Clark v. Mathewson*, 12 Pet. 164, followed.

#### 2. SAME—JUDICIARY ACT OF 1789—EQUITY RULE 56.

The judiciary act of 1789 governs the federal courts in matters of revival, to the exclusion of the provisions of any state law on the subject, and equity rule No. 56 is declarative, not only of the practice of the court, but of the provisions of the statute.

1 St. at Large, p. 90, § 31; Rev. St. 955.

*Albert Goldthwaite and A. Micou*, for plaintiffs.

*Chas. H. Lavillebeuvre*, for executor of defendant.

BILLINGS, D. J. This cause is submitted on a demurrer to a bill of revivor. The original bill was to obtain an accounting from the respondent, Jose Domingo, in behalf of the next of kin of his deceased wife, as to her estate. The bill of revivor sets out the original bill, the pendency and progress of the suit, the death of the original respondent, the probate of his last will, the appointment and qualification of the executor, and then prays for a revival of the suit against the estate of Domingo by bringing in the executor. It is not questioned that the cause of the action originally commenced against Domingo survives against his estate; but the point urged is that under the laws of Louisiana, in the courts of the state of Louisiana, all claims against the estates of decedents must be presented in the mortuary court. But the question is here one of federal jurisdiction, to be determined by the statutes of the United States, and the provisions of "these statutes are," as Judge CONKLING, in his treatise, page 469, remarks, "very ample."

The judiciary act (1 St. at Large, p. 90, § 31) provides that in case the cause of action survives, and either party dies, the court before whom such cause may be depending is empowered and directed to

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require, and that such executor or administrator may be brought in by process, and the court may render judgment in the same manner as if he had appeared voluntarily.

In *Clarke v. Mathewson*, 12 Pet. 164, a bill had been filed by Wetmore, who subsequently died. Clarke was appointed administrator, and filed a bill of revivor. Both the administrator and the respondent were citizens of Rhode Island. The court held that both upon the settled rules of equity jurisprudence, and under the statute above referred to, "the revivor of a suit in equity by or against the representative of a deceased party was a matter of right and a mere continuation of the original suit." Rule 56 in equity is declarative, not only of the practice of the court, but of the provisions of the statute. The statute of Louisiana, in this respect, operates only upon her own courts, and cannot deprive this court of a jurisdiction already vested and expressly continued by an act of congress.

The demurrer is therefore overruled, with leave to answer by the next rule-day.

See *Vattier v. Hinde*, 7 Pet. 252; *Kennedy v. State Bank*, 8 How. 586; *Nevitt v. Clarke*, Olcott, 316.

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### DUDLEY v. LAMOILLE CO. NAT. BANK.

(Circuit Court, D. Vermont. November 7, 1882.)

#### ATTACHMENT MAINTAINED THROUGH RECEIPTOR.

A deputy sheriff can maintain an attachment of personal property on the farm of an attachment debtor who does not reside upon it, through a receiptor who obtains the record title to the farm, for the purpose of keeping such property there, and the direction and control of the agents of the debtor in charge of the farm for him, one of whom was placed in chief control after the attachment was made.

*Aldace F. Walker and William H. Dickinson*, for plaintiff.

*Philip K. Gleed and Daniel Roberts*, for defendant.

WHEELER, D. J. The principal and controlling question in this case is whether the plaintiff, as deputy sheriff, could maintain an attachment of horses on the farm of the owner who did not reside upon it, through a receiptor who obtained the record title to the farm for the purpose of keeping the horses there, and the direction and control of

the agents of the owner, in charge of the farm, for him, one of whom was hired and placed in chief control after the attachment was made. There is no question of fraud in law arising out of possession by the vendor of personal property after a sale. On that question the law of Vermont is peculiar, and raises a conclusive presumption of fraud, as against creditors of the vendor, out of such possession. But as to an attachment of personal property on mesne process the law of Vermont appears to be the same as that of other states where such attachments are had. The property must be taken into the custody of the officer making the attachment, to the exclusion of the defendant in the writ of attachment. The custody of the officer may be had through the agency of others acting under him. It may be maintained on the premises of the person whose property is attached, by having his consent, without any other title to the real estate; and the acquisition of the title to the real estate will not bring with it the custody of personal property of a former owner remaining there without further taking possession of it. *Flanagan v. Wood*, 33 Vt. 332. The possession of the defendant in the attachment must in some way be excluded, and that of the officer in some way be taken. In this case the actual possession of the defendant in the attachment would not have to be excluded from the farm, for he was not there at the time in question, and did not reside there. His control was only that of his agents; when that was changed his possession was changed. This was probably sufficient, even while the agents remained the same as when the attachment was made. *Shepherd v. Butterfield*, 4 Cush. 425; *Slate v. Barker*, 26 Vt. 647. But in this case the person in chief control of the premises came in after the attachment; and came in subject to the receiptor's control as to the custody of the horses. He never was the servant or agent of the attachment debtor as to the possession of horses. His control of them was always the receiptor's control; he had never any custody for the attachment debtor to be changed to custody for the receiptor. He thus became the keeper for the officer of the horses, and his custody as such would make the attachment good, even if the right to the real estate had remained wholly in the debtor. *Newton v. Adams*, 4 Vt. 437; *Baldwin v. Jackson*, 12 Mass. 131; *Train v. Wellington*, Id. 495. This case is distinguishable from *Flanagan v. Wood*, 33 Vt. 332, much relied upon by the defendant, in two important particulars, although it is very much like that case in many other respects. These particulars are that there the debtor was in possession of the premises himself at the time of the attachment, and so continued afterwards, while

here he was not; and that there the same servant of the debtor remained there with him after the attachment, while here there was a new agent, which would indicate a change even to an observer, and put all those having occasion to know upon inquiry.

The motion for a new trial is overruled, and judgment is to be entered on the verdict.

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MICHELS v. OLMSTEAD.

(Circuit Court, W. D. Missouri. October Term, 1882.)

1. EVIDENCE—PAROL MERGED IN WRITING—COLLATERAL MATTER OR CONDITION.

When parties, without any *fraud* or *mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the *best* but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend.

2. FRAUD NOT PRESUMED.

Where a defense of fraud and deceit is set up, the law will presume that the plaintiff acted honestly and in good faith, until defendant has clearly proven the contrary.

*Tichenor & Warner*, for plaintiff.

*Peak & Yeager*, for defendant.

KREKEL, D. J., (*charging jury*.) The plaintiff, Jacob Michels, sues George P. Olmstead on an agreement in writing which stipulates for machinery to be furnished by plaintiff to the defendant at specified prices. The law favors written agreements between parties to a contract, because they are supposed to decrease the liabilities for misunderstanding. It is presumed that when a written agreement is entered into that it contains the whole of the conditions and undertakings of the parties to the contract. The supreme court of the United States has had this matter under consideration lately, and I quote from its decision so much as will show the views taken of written contracts. Chief Justice WAITE, in *Bast v. Bank*, 101 U. S. 96, says:

“When parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of the agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and now that the parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative.”

The contract read in evidence must be taken to set out the whole of the agreements of the parties, and no change of it can be made by verbal testimony unless the instrument itself shows on its face that certain matters pertaining to it are left undetermined, and when this is the case testimony may be admitted to complete the contract, so to speak.

In the quotation made from the opinion of the supreme court of the United States there are two exceptions stated to the law regarding written agreements between parties, and these are fraud and mistakes. To bring the defenses made by the defendant within this rule, he has set up in his answer certain acts and doings of the plaintiff, claiming them to be frauds upon him. It is alleged by the defendant that he was entirely ignorant of the value of the machinery for which he contracted, and that he relied on the plaintiff for the reasonableness of the charges, and plaintiff was thus enabled to deceive and did grossly deceive him regarding the cost of the articles. A manufacturer under such circumstances, if satisfactorily proven, is bound to make reasonable charges, but as nearly all articles contracted for vary in prices in different manufacturing establishments, no definite rule can be laid down as to prices, and unless they are found to be grossly exorbitant the agreement made regarding them must stand. In the attempt to arrive at a conclusion as to such charges, as by their grossness amount to a fraud, you will take into consideration the knowledge the defendant had of the value of such articles and the means at hand to inform himself regarding such. If he failed to exercise due caution, was careless or neglectful of his interest, he cannot set up his own shortcomings in his defense. This, however, affects the amount of damages only, and if plaintiff is found entitled to any damages, such an amount will be allowed him as will give him reasonable profits, estimating the original cost at the usual prices. If the machinery was to be furnished at cost, he is entitled to nominal damages only.

Another defense is that the so-called dry process by which syrup may be produced from corn is valueless, and that a marketable article cannot be produced thereby, and that the defendant was thus imposed on. The testimony on this branch of the case is conflicting, and it is here where the guaranty made by the plaintiff in the contract sued on that the process named will not only produce a merchantable article, but also in certain quantities from a given amount of corn, is of avail to the plaintiff. Under his part of the contract the defendant has a right that the means of practically testing the



process, if not already satisfactorily done, should be furnished. The defendant has chosen in this particular to rely on his guaranty, and might have secured himself in the contract against losses having their origin in a defect of the process; and unless you shall find from the testimony that the dry process is utterly worthless for the production of a merchantable article of syrup, you should find the issue on this branch of the case for the plaintiff.

If you shall find from the testimony that fraud and deceit were practiced by plaintiff Rogers or Stebbins regarding the dry process, and the defendant was thereby induced to enter into the contract, which he would not have done but for such fraud and deceit, such fraud and deceit vitiate the contract, and the defendant is relieved of any obligation incurred thereby. It will be remembered, however, in the consideration of the question of fraud, that the law abhors it, and will not attribute the commission thereof to any one, but, on the contrary, presumes that the action of the plaintiff was honest and fair. Moreover, the defendant sets up the frauds regarding the gross excess of prices charged for machinery, the frauds and deceits practiced in reference to the utility of the dry process, and he, the defendant, is held to establish these frauds on the part of the plaintiff or his confidant to your satisfaction. As already stated, the law presumes that the plaintiff acted honestly and in good faith in entering into the contract in evidence; and unless the defendant has shown to your satisfaction that he acted fraudulently in fact, you must find the issue made as to frauds and deceits for the plaintiff.

To another branch of the case I now proceed to call your attention. The written contract itself refers to, and verbal testimony is introduced to show that defendant contracted with reference to the organization of a corporation, which was to assume the obligation which he incurred by virtue of entering into the contract read in evidence, and he, the defendant, claims to be released from his obligation because such a corporation was not organized. The question here is, did the defendant enter into a binding agreement at all? You will remember what was said about the binding obligation, the solemnity of a contract, and the presumptions of law that the whole of the matters pertaining to the contract must be assumed to have been stated therein. This, however, does not touch upon or exclude the defendant from showing the conditions under which the contract was signed. Law writers have expressed the idea sought to be conveyed in the following language:

"The denial of explaining a contract by verbal testimony does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter. Still less does it exclude evidence of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

Or, as another writer expresses it:

"The first question to determine in construing a document is whether there is a document to construe. Hence it is always admissible to show by parol that a document was conditioned on an event that never occurred."

Thus, in the case before you, if you shall find from the testimony that Olmstead signed the contract sued upon with the full, definite understanding by both Michels and himself that he, Olmstead, was not to be liable personally in the event no corporation was formed, he is not bound by the contract, and you will so find by your verdict. With the \$46,000 contract which was to be carried out by Olmstead himself in case of the failure of the 2,000-bushel house of which mention was made, you have nothing to do, the plaintiff not having sued thereon.

In case you find the issues for plaintiff, you will state the amount allowed him. If you find the issues for the defendant, you will so state in your verdict.

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### BEAULIEU & ALLEN v. CITY OF PLEASANT HILL.

(Circuit Court, W. D. Missouri. October Term, 1882.)

#### 1. MANDAMUS TO COMPEL PAYMENT OF DEBT OF MUNICIPAL CORPORATION—RETURN.

The return to an alternative writ of *mandamus*, issued against a city to enforce the payment of a judgment, must show that the city has exhausted its power in the levy and collection of taxes under power conferred upon it by its charter and its amendments, and that the revenues so collected have been properly applied.

#### 2. MUNICIPAL CORPORATION—CREDITOR TAKING BOND—REMEDY.

A creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, and providing that the bond and interest shall be paid out of the yearly revenue of the city, cannot insist on remedies beyond the limitation, but may insist on the full and proper exercise of such power within the limitation.

Mr. Cockrell, for relators.

Whitsett & Comingo, for respondent.

KREKEL, D. J. Relators, Beaulieu & Allen, recovered judgment in this court against respondent, the city of Pleasant Hill, in 1881, for the sum of \$4,620. Failing to obtain satisfaction, they sued out an alternative writ of *mandamus*. The bonds, upon the coupons whereof the judgment was obtained, were issued by the city of Pleasant Hill to consolidate the floating debt of the city, under authority of an act of the legislature of Missouri amending its charter, passed in 1871. The bonds on their face recite that they were issued pursuant to section 12 of the amending act, and an ordinance of the city of Pleasant Hill providing for the payment of the floating debt of the city. The twelfth section of the amendment, providing for the consolidation of the floating debt and authorizing the issuing of bonds, in reference to them says they "shall bear interest at the rate of 10 per cent. per annum, payable semi-annually at the office of the city treasurer of the said city, which said interest shall be provided for and paid out of the yearly revenue of said city, and the principal of said bond may be paid out of the yearly revenue of said city."

The original charter of the city of Pleasant Hill, passed in 1859, provided in section 8 for the levy of taxes on real and personal property not to exceed one-fourth of 1 per cent. This section was amended in 1868, providing that the members of the council "shall have power by ordinance to levy and collect a tax not exceeding one dollar in any one year on all male inhabitants of the city of Pleasant Hill of the age of 21 years, and not over 50 years; also to levy and collect taxes on all real estate and personal property in said city subject to taxation by law not exceeding 1 per cent. on the assessed value thereof." This power, with its limitation regarding the levy and collection of taxes, was in force when the charter amendment of 1871 was passed. It did not in any way interfere with the limitation, but extended the power of taxation to the licensing and taxing of merchants, retailers, taverns, billiard tables, pigeon-hole tables, bagatelle tables, ten-pin alleys, and other gambling devices, hackney carriages, wagons, carts, drays, pawnbrokers, hawkers, peddlers, restaurants, eating-houses, livery stables, theatrical performances, circuses, and shows of whatever kind, singing concerts, and other amusements in said city; to levy and collect tax on dogs in said city; to tax, license, and regulate dram-shops and tippling-houses and saloons; to tax auctioneers; to impose fines, forfeitures, and penalties for breaches of city ordinances.

When the court issued its mandate directing the city council of Pleasant Hill to levy a tax to pay relators' judgment, or show cause

why it refused so to do, any showing of cause for refusal, if based upon the want of taxing power, should show that all taxes authorized by law had been levied, collected, and properly applied. Instead of such showing, the amended return made is that 1 per cent. has been assessed and collected on all real and personal property of the city, and that the amount thereof, \$3,500, has been expended in city expenses, except about \$1,500, which have been used in buying up judgments against the city; that the assessed value of the real and personal estate and merchandise for 1882 is \$409,000. The remaining part of the return consists of statements of the large indebtedness of the city, and its inability to pay dollar for dollar; that the city has sought to compromise its indebtedness, and offered to do so with relator without success.

The city of Pleasant Hill, aside from the right to tax all property made taxable by law, has power to levy taxes on persons and various occupations, collect fines and impose penalties, as pointed out in the quotations from its charter, which power to tax, taking the return to be true, it has not exercised. It is not the proper answer to the mandate of a court to show that a partial tax has been levied and the proceeds thereof expended in city expenses and the purchasing of judgments. The court is entitled to know what are the full resources of the city, and whether they have been called into requisition, and how the revenues are expended. In the language of the twelfth section of the amended charter of 1871 the interest on the bonds issued under it "shall be provided for and paid out of the yearly revenue of said city," so that none of the revenue of the city can be used and employed for other than ordinary purposes, so long as creditors have a claim thereon. The purposes for which the ordinary revenues may be applied are pointed out in the law, and they must be applied accordingly.

On the other hand, it would seem that a creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, cannot insist on remedies beyond the limitation, but, as stated, may insist on the full and proper exercise of such powers within the limitation. This construction does not conflict with the provision of the execution law of Missouri, giving authority to courts to compel municipal corporations by *mandamus* to levy a tax to pay unsatisfied judgments. There is application for this provision in cases where no limitations as to taxation exist, as well as within the limitations, as in this case. The power of taxation is a legislative power, and cannot be inferred. Except in cases where

a denial would work injustice, as authorizing the creation of liabilities, implied power may be inferred to raise the means for their satisfaction. In the case under consideration the city of Pleasant Hill had a floating debt, for the consolidation and settlement of which by way of bonds the legislature sought to provide. The creditor had choice between the evidence of debt possessed of and the new instruments provided. In the instance before us the creditors preferred the bonds, and took them under the limitations the law provides. It is no hardship to hold them to their choice, which may be presumed to have been wisely made. These views find support in the *Macon Co. Case*, 99 U. S. 589.

The case under consideration differs from *Britton v. Platte City*, 2 Dill. in this: that there is a provision in the Pleasant Hill act which requires the interest on the bonds to be paid out of the yearly revenues of the city. It is this provision which takes it out of the statutes of Missouri providing for payment of municipal debts and punishing neglects, and out of the rulings in the *Louisiana Case*, 103 U. S. 289, and the *Butz Case*, 8 Wall. 575.

The conclusions arrived at are that the return to the alternative writ of *mandamus* is insufficient, in its failing to show that the city council of Pleasant Hill has exhausted its power in the levy and collection of taxes under power conferred upon it by the charter of the city and its amendments, and by its failing to show the proper application of the revenues collected. Unless the return is amended in conformity to the views expressed, a peremptory writ of *mandamns* will issue directing such an amount of the revenue of the city to be levied, collected, and paid to relator as the court shall deem not oppressive.

McCARY, C. J., concurs.

v.14,no.4 -15

# MOORES v. LOUISVILLE UNDERWRITERS.

(Circuit Court, W. D. Tennessee. November 23, 1882.)

## 1. MARINE INSURANCE—SEAWORTHINESS.

If the evidence in the case establish the fact of seaworthiness, there is, where a disaster occurs without any discernible cause, a presumption of fact that the loss was occasioned by some of the perils insured against.

## 2. SAME—EVIDENCE—BURDEN OF PROOF—JURY.

When a disaster happens in fair weather and without apparent peril of navigation to cause it, there is, in the absence of other proof sufficient to countervail it, a presumption of the fact that the vessel was unseaworthy at the beginning of the voyage, but the assured may show by proof that the vessel was in fact seaworthy, and there then arises a presumption of loss by some peril of navigation covered by the policy, unless the insurer can show that it was otherwise caused by some danger not within the policy. The technical difficulties of the burden of proof are diminished in such cases by observing the distinction between that burden as a matter of pleading and the sometimes shifting exigencies of the testimony requiring further proof from the one side or the other. But in all these cases there is no fixed presumption of law or fact, but only a matter of inference by a jury from the particular facts of the case, and they are always to determine the issue according to the peculiar circumstances of each case.

## 3. SAME—POLICY—ADVENTURES—PERILS OF THE RIVER—SELF-DISTRIBUTING POLICY.

Where the form of the policy is one for general use in the insurer's business, the word "adventures," associated with the words "perils of the lakes, seas, rivers, canals, *railroads*, fires, and jettisons," cannot be permitted to enlarge the phrase "perils of the river." It is a self-distributing policy, to be construed in each case with sole reference to the subject-matter of the risk in that case, whether of lake, sea, river, canal, or railroad.

## 4. SAME—PERILS OF SEA OR RIVER.

While it is settled that the phrase "perils of the sea" does not cover all losses that happen on the sea, there is a principle of construction which gives it as extended a meaning as can be reasonably done. All navigation is perilous, and the rule that the insurer is liable only for losses occurring from extraordinary causes, means nothing more than that a seaworthy vessel will endure all ordinary perils; it does not mean that a loss for which the insurer is liable may not happen to a seaworthy vessel from the ordinary action of the sea, for it may, and the term is only used to describe those abnormal circumstances of dangerous navigation under which the loss occurs, be they what they may. Because the "peril" cannot be located, it does not follow there was none.

## 5. SAME—SEAWORTHINESS.

The best and most skillful form of construction is not required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind insured and the service in which they are engaged.

## 6. SAME—RAFT.

A raft is not, in the ordinary contemplation of the maritime law, a *vessel*; but where it is insured by a "cargo policy," and is in charge of a tow-boat, the principles of law governing a contract of insurance are applicable to it.

## 7. SAME—CASE STATED.

Where a raft of logs was insured for a voyage in charge of a tow-boat, and coming to the mouth of a river up which it was to be placed a short distance, was lost under circumstances which did not disclose any extraordinary action of the elements, or, as far as could be observed, any negligence of navigation, and it was proven that the raft was "seaworthy," held, (1) that there was, in the absence of proof to the contrary, a presumption of loss by some unknown peril insured against; (2) that it was probable the loss was caused by the combined action of the currents of the two rivers, the strain of the tugs engaged in towing, and the possible unskillful or negligent navigation of the crews employed in the tow, and all of this being covered by the policy the insurer was liable.

The defendant company issued a "cargo policy" on a raft of logs to be towed by the steam-boat Trader from the mouth of the Obion river down the Mississippi river to the mills in the city of Memphis, situated a few hundred feet above the mouth of Wolf river. The words of the policy involved in the controversy were these: "Touching the adventures and perils which the said company is contented to bear and take upon itself, they are of the lakes, seas, rivers, canals, railroads, fires, and jettisons."

The tow-boat Trader, having the raft in tow, reached the mouth of Wolf river, and doubting her ability to land it signaled for assistance, when the harbor-tugs Vanderhoff and De Soto, in the habit generally gratuitously, but sometimes for hire, of assisting the Trader and other tow-boats, went this time gratuitously to her assistance. The Vanderhoff took position up Wolf river, attached her cables to the raft, and was pulling up stream. The Trader, lying with her bow partially upon the raft, and the De Soto, with her bow squarely against the ends of the logs in the raft, were pushing up stream. The raft was next to and against some piles running from the bank and used in the tram-way of the railroad ferry transfer. This was the general situation, but no progress was made satisfactory to the Trader's captain. The De Soto's captain thought that the raft should be tied where it was, but the Trader did not assent to this, and the Vanderhoff in the distance kept on pulling. The De Soto had a signal for coal, (she was a coal tow,) and pulled out and left. A few moments after this the raft swung around towards the bank, jamming the Trader against another boat and the bank, breaking the Trader's wheel. About the same moment the raft parted, and a large portion of it floated off many miles down the river, and only a small portion of the logs floating away were saved.

There was proof by the plaintiff tending to show increased current by high water, and by the defendant that there was nothing extraor-

dinary in the state of the river, stage of water, wind, etc. The court found this fact in favor of the defendant.

There was also proof by the defendant tending to show that the raft was ill-constructed and not "seaworthy," and of the plaintiff that it was constructed as usual in such cases, and the court found this fact in favor of the plaintiff.

The plaintiff at first attributed the loss to the De Soto, filed protest and threatened suit against her owners. In the written account of the loss then filed this view of its cause was taken, but subsequently the plaintiff notified the insurance company that he should claim a loss on his policy, and demanded payment, which being refused, he brought this action. There was much proof by witnesses of their opinions as to what caused the loss; those of the plaintiff tending to the theory of extraordinary action of the currents and "boils" of the rivers at that place, and those of the defendant that the loss was due to the inherent weakness of the raft; but the general facts were as above stated, and are sufficient to explain the grounds on which the judgment of the court is based.

Harry M. Hill and W. Y. C. Humes, (with him,) for the plaintiff, cite: *Union Ins. Co. v. Groom*, 4 Bush, 289; *Washington Ins. Co. v. Reed*, 20 Ohio, 199, 208; *Patrick v. Hallett*, 1 Johns. 241; *Ellery v. New Eng. Ins. Co.* 8 Pick. 14; *Levi v. N. O. Mut. Ins. Assoc.* 2 Woods, 63; *Carruthers v. Sydebotham*, 4 M. & S. 77, 84; *Arnold v. United Ins. Co.* 1 Johns. Cas. 367; *Ham. Ins.* 35; *Walsh v. Washington Ins. Co.* 32 N. Y. 427; *Potter v. Suffolk Ins. Co.* 2 Sumn. 197, 200; *Barnewell v. Church*, 1 Caines, 217; *Wallace v. De Pau*, 1 Brev. 252; *Prescott v. Union Ins. Co.* 1 Whart. 399; *Brown v. Girard*, 4 Yates, 115; *Snethen v. Memphis Ins. Co.* 3 La. Ann. 474; *Parker v. Union Ins. Co.* 15 La. Ann. 688; *Empire Co. v. Union Ins. Co.* 32 La. Ann. 1081; *Bullard v. Roger Williams Ins. Co.* 1 Curtis, 148, 151; *Thompson v. Hopper*, 6 El. & Bl. 171, 192; *Hazard v. New Eng. Mut. M. Ins. Co.* 8 Pet. 557; *Martin v. Salem Ins. Co.* 2 Mason, 429; 3 Kent, Comm. (12th Ed.) 217-291, 300; *Magnus v. Buttemer*, 2 C. B. 876, (73 E. C. L. 876;) *Bishop v. Pentland*, 7 Barn. & C. 219, (14 E. C. L. 35;) *Patterson v. Harris*, 1 Best & S. 336, (101 E. C. L. 552;) 1 Parsons, *Marine Ins.* (1868,) 377, 544; *Fletcher v. Inglis*, 2 Barn. & Ald. 315; *Hale v. Washington Ins. Co.* 2 Story, 185; 1 Phil. Ins. 636; *Green v. Brown*, 2 Story, 199; *Newboy v. Read*, Park. 106; *Fremlow v. Oswin*, 2 Camp. 85; *Baker v. Ins. Co.* 12 Gray, 603; *Dixon, Marine Ins.* § 242; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553; *Coles v. Marine*



*Ins. Co.* 3 Wash. 159; *Anthony v. Etna Ins. Co.* 1 Abb. 344; *Miller v. Ins. Co.* 12 W. Va. 130; *Chandler v. St. Paul Ins. Co.* 18 Am. Law Reg. 385; *Palmer v. Ins. Co.* 1 Story, 364; *Yeaton v. Fry*, 5 Cranch, 335; 2 Arnold, *Ins.* 807; *Wheeler v. Walker*, 55 Ga. 256; *Hagar v. New Eng. Mut. Marine Ins. Co.* 59 Me. 463; *Flanders*, Shipp. 202, note 2, 294; 1 Bouv. Law Dict. 350; *Ingersoll*, Roccus, 111; 3 Phil. Ev. 275, and note; 1 Taylor, Ev. 212, § 205; 2 Taylor, Ev. 978; *Ins. Co. v. Wilson*, 3 Cranch, 187; *Ins. Co. v. Mordecai*, 22 How. 111; *Watson v. Ins. Co., etc.*, 2 Wash. C. C. 153; *Lawrence v. Mintburn*, 17 How. 100; *Dupont de Nemours v. Vance*, 19 How. 170; *The Mohawk*, 8 Wall. 153; *Bulkley v. Naumkeag*, 24 How. 386; *Waters v. Merch. Louisville Ins. Co.* 11 Pet. 213; *Pope v. Swiss Lloyds*, 6 Sawy. 533; *Union Ins. Co. v. Shaw*, 2 Dill. 14; *Chase v. Eagle Ins. Co.* 5 Pick. 51; *Cary v. Burr*, 8 Q. B. Div. 313; *Lunt v. Boston Marine Ins. Co.* 6 FED. REP. 562, 566; *Hathaway v. St. Paul Ins. Co.* 1 FED. REP. 197.

*H. C. Warinner*, for defendant, cites: 2 *Parsons*, *Marine Ins.* 399, 518, 538; *Patrick v. Hallett*, 3 Johns. 76; *Talcot v. Commercial Ins. Co.* 2 Johns. 124; *Garrison v. Memphis Ins. Co.* 19 How. 312; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351; *Sansum*, Dig. *Ins.* 1242; *Norrice v. Anderson*, L. R. 10 C. P. 58; *Cort v. Delaware Ins. Co.* 2 Wash. C. C. 375; *The China*, 6 Wall. 53; *Rugley v. Limited Mut. Ins. Co.* 7 La. Ann. 279; *Marcy v. Limited Mut. Ins. Co.* 11 La. Ann. 748; *Ins. Co. v. Tobin*, 32 Ohio St. 77; *Gastride v. Ins. Co.* 62 Mo. 322; *Flanney v. Marine Ins. Co.* 4 Whart. 59; *Coffin v. Phoenix Ins. Co.* 15 Pick. 291; *Johnson v. Finney*, 4 Yerger, 48; *Gardner v. Buchanan*, 5 Yerger, 81; *Turney v. Wilson*, 7 Yerger, 343; *Dyer v. Ins. Co.* 53 Me. 118; *Ins. Co. v. Tweed*, 7 Wall. 44; *Ins. Co. v. Boon*, 105 U. S. 117; *Breed v. Providence Washington Ins. Co.* 17 Blatchf. 287; *Rothschild v. Royal Ins. Co.* 7 Exch. 734; together with many of the cases cited for the plaintiffs, as above shown.

HAMMOND, D. J. This case has been twice argued,—the court, by stipulation, under the statute, sitting without a jury. On the first argument it seemed to me plain that, there being no extraordinary action of the elements, nor, so far as I could see, any apparent peril of the river to cause the loss, nor any proof of damage by some unseen peril of navigation, the judgment should be for the defendant company on the ground that there was some inherent defect in the thing insured, which rendered the raft incapable of enduring the ordinary strain of navigation, although the proof, outside the fact of loss itself, was satisfactory as to the “seaworthiness,” or, more accurately, perhaps, as counsel call it, “riverworthiness” of the ves-

sel and raft. However, I based my judgment more on what then seemed to me to be the failure of the plaintiff to answer the burden of proving that the loss was occasioned by some peril of river navigation insured against, than on any resolution against him of the fact that it was not so caused.

The reargument was asked on the claim that, as a matter of law, if the "seaworthiness" at the inception of the risk be established by proof, as I held it was, the presumption would be that the loss occurred by a peril of river navigation, no matter whether the active agency causing it could be discerned or not. This is a question about which I find there is much conflict, and, to my mind at least, great confusion of authority and statement, some of which I imagine results from overlooking an important distinction adverted to by Mr. Flanders between cases arising on bills of lading against the carrier for a violation of his undertaking and those against an insurer for indemnity under his contract. Flanders, Shipp. 183. It is, I think, more a question of fact than one of law; and following a frequent declaration that it is a question for the jury and not the court, and believing, as I do, that the solution of such a question is better reached by the concurrence of twelve minds than the judgment of one, I have been inclined to require the parties to go to the jury; but it may be that the court should not, where the parties choose under the statute to waive a jury, decline to try the issues of fact, and this doubt has impelled me to abandon that inclination.

The latest and best discussion of the question I have found is in the case of *Pickup v. Thames Ins. Co.* 3 Q. B. Div. 594. It is there adjudged that the burden of proving unseaworthiness is on the insurer, there being a *prima facie* presumption of seaworthiness in favor of the assured. The probative value of the fact that a loss occurs without any extraordinary action of the elements, or any discernible peril to cause it, is treated as sufficient, *in the absence of other proof* and under some circumstances, to establish the unseaworthiness at the time the risk commenced. The time between the sailing and the disaster is an element for the consideration of the jury more or less cogent according to circumstances, and it is for the jury to say whether, under the circumstances of the voyage, the time of loss was so soon after sailing that it raises the presumption of unseaworthiness. It is not a presumption of law at all, nor a fixed presumption of fact either way, but a matter of inference by the jury under all the proof from the special circumstances of the case. I think the case cited correctly states the law according to the weight of the author-

ities, though perhaps many of them do not treat the *prima facie* assumption of seaworthiness as a presumption, throwing the burden of proof on the insurer to establish unseaworthiness, but say that the plaintiff must prove the fact of seaworthiness, and the burden is answered by the very slightest proof, such, for example, as the starting on the voyage. It is not, however, far wrong to say that there is, to begin with, a presumption of seaworthiness. But when this is challenged by any proof of the defendant, such as a disaster without apparent cause, from the action of the sea or something external to the ship, the plaintiff must meet that challenge by proof of seaworthiness at the inception of the risk. He may do this by the exhibition of a cause sufficient to occasion the disaster to a seaworthy vessel, by proof of circumstances sufficient to countervail the inference mentioned, or by the testimony of witnesses as to the actual condition of the vessel. But all this is for the jury to weigh and determine the fact according to the special circumstances of each case.

In this case the voyage was nearly or quite ended, the disaster taking place only a few hundred feet from the point where the raft was to have been landed. It had successfully sustained, up to that time, all the perils of the voyage. But counsel say that this was coming down stream with the current, and that the disaster occurred the very moment the raft was turned up stream, and that this is conclusive there was not sufficient strength to resist the up-stream part of the voyage. It was in cribs, the logs being pinned together and the cribs bound together with ropes and chains. One witness did say if it had been more substantially fastened together and more rigid it would have better withstood the current and other difficulties of navigation; but he said, too, that he had put hundreds up this river constructed as this raft was. Other witnesses said the pliable form of construction was the better. Be this as it may, while I might be willing to say it seems more reasonable that the firmer the raft the better for its navigation, yet this is not, as I understand, the test of seaworthiness. It is not the best form of construction that is required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind insured and the service in which they are engaged. It may be that a steel or iron ship would resist a given peril better than a wooden one, or that a ship of one form and construction may be more staunch than one of another; but this is not what is required. To permit this kind of proof to overcome the presumptions arising from established seaworthiness by proof of construction according to the usual mode for the particular class of

vessels, and for that particular service, would be to release the insurer from liability on risks taken upon all vessels not of the best and most skillful construction. 1 Parsons, Marine Ins. 367, 372, 386; 1 Phil. Ins. 308, 309.

I am content to find that the proof in this case establishes that the raft was "seaworthy,"—that is to say, so constructed that it was capable of withstanding the strain of navigation on the voyage insured by the defendant,—and that the other proof in the case overcomes any presumption of inherent defects arising from the want of sufficient proof of extraordinary causes for the disaster, assuming that there are no such causes discernible in this case.

Now, the question arises,—if we have given a "seaworthy" vessel and a disaster without any discernible cause,—is there a presumption that the loss was occasioned by some of the perils insured against? I have found no authority that satisfactorily answers this question put in this form. Cases are abundant which discuss whether this or that "peril," or this or that cause of disaster, comes within the phrase "perils of the sea," (or perils of the river, in this case,) or such other terms contained in the particular policy as may be thought to cover it; as, for example, in most English policies, where there is a phrase now established to mean more than "perils of the sea," when they say "all other perils, losses, and misfortunes that have or shall come to the subject-matter of this insurance, or any part thereof."

The latest and a very able and instructive case on this subject is that of the *West India Tel. Co. v. Home Ins. Co.* 6 Q. B. Div. 51. It will be found by examining the cases there cited, and those cited elsewhere in tracing them, that at first the English courts were asked to limit this supplemental clause in their policies upon the principle of *ejusdem generis* construction to such causes as come within the designation "perils of the sea," and upon arguments that seem to me quite difficult to answer. But the courts naturally and very readily laid hold of these additional words to relieve themselves of the always acknowledged difficulty of defining what is meant by "perils of the sea" in what our supreme court calls "an obscure, incoherent, and very strange instrument." *General Mut. Ins. Co. v. Sherwood*, 14 How. 361. By this means they got back to the principle of construction—or very nearly so—laid down by Emerigon, namely: that "the general rule is, assurers answer for all loss and damages that happen on the sea," and they seem somewhat to regret that any departure was ever made from it. And in commenting on it, while maintaining the

established rule that the phrase "perils of the sea" does not mean all losses that happen on the sea, Lord Justice BRETT agrees that the English law gives this general phrase "as large a construction as you reasonably can." 1d. 60.

The policy here does not, as some American policies do, contain this supplemental clause. Learned counsel base an argument that it does go as far upon the use of the word "adventures," and the association of the usual words with "railroads, canals," etc.; but I do not think this sound. The word "adventures" is a time-worn word in these policies, and is used everywhere as synonymous with "perils," or so nearly so that they cannot serve to enlarge the policy in the manner contended for by counsel. It is often used by the writers to describe the enterprise or voyage as a "marine adventure" insured against. But it is unnecessary to cite instances of these uses of the word,—though I have gathered many,—because it frequently occurs everywhere in this connection. As to the use in the policy of "railroads," it is associated with "lakes, seas, rivers, canals, and jettisons" merely as a convenient form of general policy to receive any risk within the scope of the company's business, and it must be construed with reference always to the particular risk. If it be on the "lakes," it is a risk limited to lake navigation; if on the "seas," to ocean navigation; if on the "river," as here, to river navigation; and if on "railroads," to railroad transportation; and the contract is to be read as if these words were not so associated. It is a kind of self-distributing policy, according to the subject-matter.

Reasoning that the burden of proof is on the assured to show that the loss occurred by some one of the perils insured against, and that the insurer was not a guarantor of safe arrival, but only an insurer against extraordinary perils, I at first thought the fact that the plaintiff had not made it plain that this loss occurred by some extraordinary peril should turn the case against him. But having established that the raft was "seaworthy,"—I use this technical term as I do not much relish "riverworthy,"—I do not now see why his case is not in the same condition as if there had been no challenge of that fact. In other words, if we concede fully that when a disaster happens in fair weather, and without apparent sea peril, there is a presumption of unseaworthiness, when that presumption of fact is rebutted,—as I have shown it may be, and as I hold it has been in this case,—does it not logically follow that the loss occurred by a "peril of the sea?" I think so, unless the insurer proves that it occurred by some cause not within that designation, or which has been excepted from the

policy. All navigation is perilous, and this policy does not say the indemnity is against *extraordinary* perils only. It is true, we are in the habit of saying that the insurer is only liable for extraordinary perils, but this means nothing more than that a seaworthy vessel will endure safely all ordinary perils. It does not mean that a loss for which the insurer is liable may not come from the ordinary action of the sea, for it may; and the term is used only to describe those abnormal circumstances, be they what they may, of dangerous navigation under which the loss occurs.

Now, the proof in this case is clear, I think, so far as the observation of the witnesses goes, that there was nothing extraordinary in the currents or winds, or other elements of danger to the raft; and, so far as I can see, all engaged were doing the very best they could in the conduct of the navigation. But *non constat* that there was not some abnormal action of the current or the wind, or some other force engaged not detected or observed by the witnesses, or some negligence of the people concerned not recognized as such, or some combination of all these, to cause the loss. Because we cannot locate the "peril," it does not follow there was none. Given a seaworthy craft, in the absence of all proof to the contrary, I think the presumption is that the disaster occurred from some extraordinary cause, although indiscernible; and I place this presumption precisely where the antipodal presumption we have been considering is placed in *Pickup v. Thames Ins. Co. supra*. There the court requires the assured to rebut the presumption of unseaworthiness by proof, and here, it seems to me, the insurer must rebut the presumption of loss by peril insured against by proof of loss by other means.

Technical difficulties about the "burden of proof," and its shifting from one party to the other, are made plain by that case, and, if we observe the distinction between the "burden of proof" as it exists as a matter of pleading merely, and as it is less technically applied to the exigencies created by the sometimes shifting force of the testimony in respect to its imposing a burden of further evidence on the one side or the other to bring about that preponderance of probative value necessary to convince the minds of the triers of the fact in issue, these all vanish, and, though sometimes difficult, it is not impossible to reach a rational solution of the issue.

But I do not base my judgment wholly on the above presumption. While the proof is unsatisfactory as to the precise cause of the loss, I think it may be taken to establish that it was the combined action of the two currents and the strain of the tugs under the difficulties of

the situation, the immediate cause being, perhaps, the withdrawal of the De Soto. How far negligence or unskillfulness in handling the tow contributed to it is difficult to say, but perhaps largely. That this was a peril insured against I have now no doubt, and it was a mistake to rule that because there was apparently no extraordinary condition of wind and current there was no peril of navigation to cause the loss. The tide of the sea is as ever present and as normal in its action as the current of a river. It ebbs and flows, but its action is understood, and a matter of almost accurate knowledge and calculation to navigators. Yet in *Fletcher v. Inglis*, 2 Barn. & Ald. 315, and in *Bishop v. Pentland*, 7 Barn. & C. (14 E. C. L. 33,) and other cases where there was no extraordinary action of the tide, its ordinary action occasioned a loss, through defective fastenings with cables, that was held to be within the policy. And in *Smith v. Scott*, 4 Taunt. 126, there was no extraordinary action of the sea to cause the collision, but only negligence of the vessel colliding with the one insured which was the extraordinary circumstance. Lord MANSFIELD said: "I do not know how to make this out not to be a peril of the sea. What drove the Margaret against the Helena? The sea. What was the cause that the crew of the Margaret did not prevent her from running against the other? Their gross and culpable negligence; but still, the sea did the mischief." And in *Devaux v. J'Anson*, 5 Bing. (N. C.) 519, (35 E. C. L. 207,) and *Walker v. Maitland*, 5 Barn. & Ald. 171, (7 E. C. L. 59,) and many other cases, including those already cited, it is established beyond question that the policy covers negligence of the officers and crew where, of course, there is no fraudulent collusion with the owner; and these cases have been approved by our own supreme court in *Waters v. Merchants' Ins. Co.* 11 Pet. 213. It is true that in most, if not all, those cases the supplemental words before referred to were found in the policy, but our supreme court does not predicate its judgment on these words. The loss there was by "fire," which was specially mentioned in the policy, and that it was occasioned by negligence of the crew was held not to excuse the insurer. So, here, the action of the two currents, and the force of cables and tugs applied to this raft, were the ordinary forces of river navigation acting on it with sufficient force to part the raft and cause a portion of it to be lost. This was a "peril of the river." Whatever negligence of the crew contributed to this cannot excuse it, and the loss was within the terms of the policy. The perils of our river navigation are more insidious, perhaps, than those of the sea,

and far more difficult, I should think, to trace as precise causes acting to occasion a loss.

Applying the principles of construction already mentioned, it would be placing upon a policy-holder too great a burden to require him in a case like this to demonstrate with exactness what particular force operated to make his loss, and that there was some extraordinary action of the winds or currents, or extraordinary stages of water, or the like. It would emasculate these policies and reduce their value to permit this company to escape on the facts of the case, because, forsooth, the witnesses could see nothing in wind, current, or navigation that was not in the usual and ordinary course.

I have, following the counsel, treated this case as if this raft were a "vessel," but I think it is not. The policy is not one on a vessel, but on the *cargo* of a vessel, and is called by its terms a "cargo policy." I have not been able to find any discussions of the subject of insurance of rafts, but in an elaborate case the learned judge of the eastern district of Michigan, sitting in this court, held that a raft of logs floating unattached to any vessel and navigated by men upon it was not a vessel within the admiralty jurisdiction. *Raft of Logs*, 1 Flippin, 543. I think it must be treated as the cargo of the tow-boat having it in charge, and not as a "vessel." But so treated the principles of insurance law applicable to the case are the same, and the distinction is quite immaterial. It is mentioned here merely out of caution, and to explain the method of dealing with the subject. On the whole, the plaintiff must have judgment for his partial loss, and if the parties cannot agree on the amount, I will adjudge it, on application to enter the judgment.

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### ARN v. CITY OF KANSAS.

(Circuit Court, W. D. Missouri. October Term, 1882.)

#### 1. SURFACE WATER—INJURY FROM DIVERTING.

The law regarding surface water is that no individual or corporation can make any change thereof to the injury of any one without being responsible in damages for such injury.

#### 2. MUNICIPAL CORPORATION—INCREASING FLOW OF SURFACE WATER.

If a city constructs a sewer in such a manner that an *additional* flow of surface water into a lot is caused thereby, the owner of such lot may recover such damages as may have been caused by such *increased* flow.



## 3. SAME—CONSTRUCTING SEWERS—INJURY TO PROPERTY.

A city, in the progress of constructing its sewerage, is not responsible for any depreciation in the rental value of property caused by the bad smells of a sewer in course of construction, unless it is kept open an unreasonable length of time.

*Bouscaron & Kenyon*, for plaintiff.

*Mr. Twitchell*, for defendant.

KREKEL, D. J., (*charging jury*.) The plaintiff, Arn, brings this suit to recover of the City of Kansas damages for the diminution of the rental value of a house and lot situated at the junction of Nineteenth and Main streets, caused by the foul and filthy discharge of a sewer upon part of the plaintiff's premises, and for the washing away of the soil of part of the lot, thereby damaging the lot itself. It appears that a certain territory now within the city limits of Kansas City naturally drains its surface water across Main street and into a lot adjoining the lot of plaintiff, from which it passes in its natural flow into the lot of plaintiff. It further appears that in 1877 the City of Kansas constructed a culvert across Main street to improve the street, and secure a proper passage over it of the surface water flowing at the place of constructing the culvert. And it still further appears that in 1880 the progress of the city made it necessary to construct a sewer from Walnut street along Eighteenth to Main street, and thence along Main street into the culvert before spoken of, making the culvert a part of the sewer which is now extended into Nineteenth street, thence west and parallel to plaintiff's lot.

The matter in dispute is, *first*, the location of the culvert, it being contended on the part of plaintiff that it is not located in the place of the old drainage, but that the location has been so made as to change the flow of the surface water, thereby causing the water to wash away the soil and injure the value of the lot itself, as well as the rental of the premises. The law regarding surface water is that no change thereof can be made to the injury of any one. No individual or corporation can make such change, and if it is done, and injury is incurred thereby, the wrong-doer is responsible in damages. You are therefore instructed that if you shall find from the testimony that the defendant, the City of Kansas, has constructed the sewer in question, not along the ancient drainage, but so diverted the natural course of the water as to change the force and effect of the flow that the soil of plaintiff's lot was washed away, you should find this issue for plaintiff, and allow him such damage as plaintiff has sustained thereby. But if the jury shall find from the evidence that the sewer in controversy was constructed upon the ancient flow of

the water, they should find this issue for the defendant. It is an undisputed fact that the water flowing through the sewer along Eighteenth street from Walnut to Main, and down Main street, carries off a part of the surface drainage which formerly flowed across Main street, at or near the place of the location of the culvert. But it is contended that by virtue of the improvements along Eighteenth and Main streets an additional amount of water is discharged into this sewer, and that such additional water increased the flow of water into plaintiff's lot, and injury resulted therefrom. Regarding this additional flow of water, if such has been shown to exist, you are instructed that plaintiff has a right to recover such damage as has been done by it to his lot. It is the damage done by the water which may have been added by virtue of the sewer spoken of, and not for the whole water; in other words, if the sewer gathered other than surface water, and damages were done on account of such increase of water, plaintiff may recover such damages.

We now come to the injury which is claimed to have resulted from the discharge of nauseating and filthy water and deposits, affecting the rental value of the premises. Regarding this you are instructed that the City of Kansas, in the progress of constructing its sewerage, is not responsible for the bad smells of a sewer in course of its construction, unless kept open an unreasonable length of time. The reasonableness of the time is to be judged of by the circumstances testified to. If you shall find from the testimony that the sewer testified to was left an unreasonable time in the condition it was, and in consequence of the bad smells thereby created the plaintiff could not rent his house at what it was really worth, you will allow him the difference between the real rental value and the rent he received, and this for the length of time the sewer was left open and plaintiff sustained damages in consequence thereof. As to the washing away of the soil of plaintiff's lot you are instructed that if you shall find from the testimony that an increase of flowing water was caused by the sewer run into the culvert, and that such increase of water contributed to the washing away of the soil of plaintiff's lot, you will allow him such damages on that account as will compensate him for the restoration of the lot to the condition it would have been in had such additional flow of water not taken place.

In your verdict, if you find for the plaintiff, you will find the damages sustained on account of rental value and on account of damages to the lot separately, and then state the whole of the damages allowed. If you find the issues for the defendant, you will so state.

NAT. BANK OF CHESTER CO. v. COM'RS OF CHESTER CO. and others.\*

(Circuit Court, E. D. Pennsylvania. October 2, 1882.)

1. CONSTITUTION LAW—STATUTE—SUBJECT EXPRESSED IN TITLE—REPUBLICATION OF ORIGINAL ACT IN AMENDMENT—TAXATION—NATIONAL BANK.

By section 17 of act of June 7, 1879, entitled "An act to provide revenue by taxation," the Pennsylvania legislature enacted that where any banks elected to pay a tax of six-tenths of 1 percent. on the value of the shares, the shares, capital, and profits of the bank should be exempt from other taxation. By act of January 10, 1881, entitled "A supplement to an act entitled 'An act to provide revenue by taxation, approved June 7, 1879,'" the portion of the seventeenth section of that act containing the above provisions was re-enacted, with the exception that the exemption from taxation was confined to "so much of the capital and profits of such bank as shall not be invested in real estate." The whole section was not re-enacted, and there were some immaterial verbal alterations in the part which was set out. *Held*, that the act of January 10, 1881, did not violate the constitutional provision that no bill should contain more than one subject, which should be clearly expressed in the title. *Held, further*, that it did not violate a constitutional provision that no law should be amended by reference to the title only, but so much thereof as was amended should be re-enacted and published at length.

2. SAME—REPUGNANCY IN STATUTE.

It appeared that at the time of the passage of the act of 1881 the only national bank property taxable for local purposes was its real estate. *Held*, that this did not render the act void for repugnancy.

PER BRADLEY, J. To declare an act of assembly repugnant the repugnancy must appear upon its face, and must be in conflict with the main intent and object of the enactment.

Motion for injunction upon a bill in equity by the National Bank of Chester county, against the commissioners of Chester county, Pennsylvania, setting forth—

(1) That the plaintiff is an association for carrying on the business of banking, duly incorporated under the national bank act of June 3, 1864.

(2) That, under the laws of the state of Pennsylvania, moneyed capital in the hands of individual citizens of said state is exempt from local taxation, and is subject to a state tax of four mills on every dollar of the value thereof, annually, and the shares of state and national banks are taxed at the same rate.

(3) That the act of the legislature of Pennsylvania, approved June 7, 1879, entitled "An act to provide revenue by taxation," in section 17 thereof, provides as follows: " \* \* \* In case any bank or savings institution, incorporated by this state, or any national bank, elect to collect annually from the shareholders thereof a tax of six-tenths of 1 per centum upon the par value of all the shares of said bank or savings institution, and pay the same in the state treasury on or before the twentieth day of June in every year, the shares,

\*Reported by Frank P. Richard, Esq., of the Philadelphia Bar.

capital, and profits of such bank shall be exempt from all other taxation under the laws of this commonwealth."

(4) That the supreme court of Pennsylvania decided that, in the case of national banks paying the increased state tax, the exemption secured thereby extends to all local taxation whatever upon the real estate of such bank.

(5) That, shortly after the said decision of the supreme court of Pennsylvania, viz., January 10, 1881, the legislature of Pennsylvania passed a certain other act, entitled "A supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, 1879," the third section of which provides as follows:

"Sec. 3. In case any bank or savings institution, incorporated by this state or the United States, shall elect to collect annually from the shareholders thereof a tax of six-tenths of 1 per centum upon the par value of all the shares of said bank or savings institution, and pay the same into the state treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank *as shall not be invested in real estate*, shall be exempt from all other taxation under the laws of this commonwealth."

(6) That, in February, 1882, the plaintiff paid to the commonwealth of Pennsylvania, for the year 1882, the sum of \$1,350, being a tax of six mills upon the par value of all of the shares of the plaintiff's bank.

(7) That the plaintiff owns certain real estate in West Chester, Pennsylvania, on which the defendants have levied local taxes for the year 1882; that the third section of the act of June 10, 1881, is inoperative and void, for the following reasons: *First*, because the title to said act is in conflict with article 3, § 3, of the constitution of Pennsylvania, which provides: "Sec. 3. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in the title." *Second*, because the third section of said act is in conflict with article 3, § 6, of the constitution of Pennsylvania, which provides as follows: "Sec. 6. No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to the title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," in this: that said third section materially amends the provisions of section 17 of the act of June 7, 1879, (to which it is a supplement,) and fails to re-enact and publish at length so much of said act of June 7, 1879, as is thereby amended. *Third*, because said third section of the act of June 10, 1881, in so far as it attempts to make the real estate of national banks taxable for local purposes, is inoperative and void for repugnancy, in this: Under the act of congress of June 3, 1864, known as "The National Bank Act," only the shares and real estate of national banks are taxable under the state laws. The shares are not taxable at any higher rate than "moneyed capital of individuals." Moneyed capital of individuals is in Pennsylvania exempt from local taxation, and was so exempt prior to the passage of the said acts of June 7, 1879, and June 10, 1881. At the time of the passage of the act of June 10, 1881, the only national bank property taxable for local purposes was its real estate. The saving clause of the third section of the act of June 10, 1881, excepted from the operation of said act the only property to which the

exemption therein given could extend, to-wit, the real estate of national banks. Said exception or saving clause in the said third section of the said act of June 10, 1881, is thus void and inoperative, as being repugnant to the purview of said act.

The bill prayed for an injunction against the defendants from levying taxes for 1882 upon the plaintiff's real estate.

Defendants demurred.

*James W. M. Newlin, Wm. B. Waddell, and J. M. Gazzam*, for plaintiff.

*Samuel D. Ramsey and Thomas S. Butler*, for county commissioners.

Before BRADLEY, Justice, and BUTLER, D. J.

BRADLEY, Justice, (*orally*.) We have no doubt that the act of assembly of June 10, 1881, is constitutional. The title clearly expresses the purposes of the act; and the old law, as amended, is re-enacted at length in the supplemental act. Nor is the act repugnant. To declare an act of assembly repugnant, the repugnancy must appear upon its face, and must be in conflict with the main intent and object of the enactment. The bill is dismissed.

See *Second Nat. Bank v. Caldwell*, 13 FED. REP. 429, and note.

### VITI and another v. TUTTON, Collector, etc.\*

(Circuit Court, E. D. Pennsylvania. October 24, 1882.)

#### 1. CUSTOMS DUTIES—MANUFACTURE OF MARBLE—PROFESSIONAL PRODUCTIONS OF A STATUARY—SECTION 2504, REV. ST.

The "professional productions of a statuary or of a sculptor" include all the artistic work of a professional statuary or sculptor produced in the exercise of his profession, whether the creations of the artist or copies of the creations of others.

#### 2. SAME—RATES OF DUTIES.

Such importations are liable to a duty of 10 per centum *ad valorem*, and are not to be classed with "all manufactures of marble, not otherwise provided for," which are liable to a duty of 50 per centum *ad valorem*.

#### Motion for Judgment upon Special Verdict.

The jury found the following special verdict:

That during the years 1879 and 1880 the plaintiffs were partners, trading as Viti Brothers, and the defendant was, during said time, collector of customs for the port of Philadelphia; that between the thirteenth day of No-

\* Reported by Albert B. Guilbert, of the Philadelphia bar.

vember and the twentieth day of December, A. D. 1879, the plaintiffs imported into the port of Philadelphia six boxes containing statuary: One marked No. 1076, containing statues, two boys; one marked No. 1074, containing an angel sitting in the attitude of writing; one marked No. 1077, containing an angel standing in the attitude of praying; one marked No. 1078, containing a statue representing summer; one marked No. 1079, containing a statue representing autumn; one marked No. 1080, containing a statue representing winter.

3. That the statues of the two boys were taken out and sculptured from antique original models, and that the author of those models is unknown.

4. That the statues of the two angels were taken out and sculptured from original models made by the sculptor Achille de Cori, a pensioner of the government at Rome; that he is a professional sculptor, and as such enjoys a good reputation, and is known in Carrara as a professional sculptor, and won at the Royal Academy of Fine Arts of Carrara the prize of a government pension at Rome.

5. That the said three statues, representing summer, autumn, and winter, were taken out and sculptured from original models designed and executed by Carlo Nicoli, an honorary member of the Academy of Fine Arts at Carrara; that he studied sculpture in the Academy of Fine Arts there, and then in Florence and Rome; that he enjoys the best reputation as a professional sculptor, and is recognized in Carrara as a professional sculptor; that he obtained the prize of the government pension at Rome; that for his professional merits in sculpture he was decorated by the government of Spain; and that in open competition he won the prize of three years' government pension in the Academy of Fine Arts at Carrara, and is also an honorary member of the Academy of Fine Arts at Madrid, Spain, and Urbino, Italy, and obtained several prizes at the artistic exhibitions of Florence, Parma, and Madrid.

6. That all the said statues contained in the said six cases were executed in the studio of Pietro Salada, by Giovanni Padula and Alessandro Gemignani professional sculptors, under the direction of the said Pietro Salada, and that the said Pietro Salada has been a professional sculptor in Carrara for the last 34 years.

7. That with the exception of the "Two Boys," which were executed from, antique originals, the other statues were sculptured for the first time from the originals expressly executed by the said De Cori and Nicoli, and were the first productions from said models.

8. That the cost of the "Two Boys" was 300 lire each, or 600 lire; and of the two angels 690 lire each; and of the three seasons 480 lire each.

9. That defendant, as said collector, exacted from said plaintiffs thereon duties as follows: 50 per cent. *ad valorem*; which duties were paid by the plaintiffs on the dates mentioned in the bill of particulars, to-wit, March 24, 1880.

10. That on February 8 and February 9, 1880, the plaintiffs made due protest against the exaction of said duties, claiming that said marble statuary was dutiable at 10 per cent. *ad valorem*.

11. That plaintiffs made due appeal to the secretary of the treasury from said decision of said collector, who, on March 18, 1880, affirmed the said decision.

ion of the said defendant, whereupon, within 90 days thereafter, plaintiffs brought this suit.

12. That the amount exacted by the said defendant, over and above the amount claimed to be due by the plaintiffs, on the boys was	\$43.60
On the two angels,	97.60
And on the three seasons,	101.20

In all amounting to the sum of	\$242.40
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And the said jurors say that they are ignorant, in point of law, on which side they ought, upon the facts, to find the issue; but that if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the statues of the two boys, above the amount claimed to be due by the said plaintiffs, then they find for said plaintiffs in the sum of \$43.60, with interest thereon.

That if the court should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the two statues, representing two angels, above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of \$97.60, with interest thereon from March 30, 1880.

That if the courts should be of opinion that the plaintiffs are entitled to recover the money paid as duties on the three statues, representing the seasons, above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the further sum of \$101.20, with interest from March 30, 1880.

That if the court should be of the opinion that the plaintiffs are entitled to recover the moneys paid as duties on all the aforesaid statues, above the amount claimed to be due by the said plaintiffs, then they find for the said plaintiffs in the sum of \$242.40, with interest thereon from March 30, 1880.

The decisions of the treasury department are as follows:

Under date of October 27, 1879, the treasury department decided. (Synopsis of Decision, 4266:)

"The term *statuary*, as used in the law, has a twofold meaning: *First*, the finished production of a sculptor or statuary; and, *second*, the person who professes to practice the art of sculpturing. Webster defines a *statuary*, in the sense last above used, as one who professes or practices the art of carving images or making statues. He defines a *sculptor* to be 'one who sculpts; one whose occupation is to carve images or figures.' The words under this definition are nearly, if not quite, synonymous.

"In a note to a decision (3942) of March 31, 1879, the department has defined what articles shall be admitted as the work of an artist under the provision which admits the productions of American artists free of duty. It is there held that a statue in bronze or marble may be the work of an artist, although the identical figure imported may have been cast or carved entirely by other hands than his own, if the model from which the figure was cut or cast was the creation of the artist. The distinction between an artist and an artisan is given by Webster as follows: 'An artist is one who is skilled in some one of the fine arts; an artisan is one who exercises any me-

chanical employment. A portrait painter is an artist; a sign painter is an artisan.' Something of this direction must be inferred from the language of the provision for statuary before referred to. If congress had intended to admit all statuary under the provision for statuary, whether the work of an artist or a mere artisan, the word 'statuary' would have been sufficient. It, however, evidently intended a limitation of this general sense when it declared that the term 'statuary,' as used in the laws, shall be understood to include the professional productions of a statuary or of a sculptor only. The key to the intended limitation seems to be found in the word 'professional.' The distinction between a profession and a trade, or mere occupation, is well understood in the common use of language. One of the definitions of the word 'profession,' as given by Webster, is 'the occupation—if not mechanical, agricultural, or the like—to which one devotes himself.' In both the common and the critical use of language the word 'profession' implies a higher order of employment than that of a mechanic or artisan, and it is difficult to attach any meaning whatever to the restrictive clause of the statute, unless it be that the term 'statuary' shall include only the productions of artists, as distinguished from mechanics or artisans.

"This view is fortified by the manifest intention of congress in other provisions of the tariff laws adopted to encourage works of art, as, for instance, in the provision for the free admission of articles imported for the use of any institution established for the encouragement of the fine arts. Also in the provision for the free admission of works of art imported for presentation to national institutions, or to any state or municipal corporation. Also in the provision that paintings and statuary imported for exhibition by any association for the promotion of science, art, and industry may be admitted free, to be exported within six months, under section 2512 of the Revised Statutes. Also the provision that paintings, statuary, and other works of art, the production of American artists, may be admitted free of duty.

"In the view of the subject thus presented, the quality of the material, whether veined or statuary marble or sandstone or granite, is immaterial; nor, indeed, can the artistic merit of the particular statue in question be the criterion for classification. If it be the production of a professional statuary or sculptor in the sense above defined, it is statuary within the intent of the law. On the other hand, if it be but a mere mechanical copy, however perfect, of Phidias or Praxiteles or other ancient artists, it is not the professional production of a statuary or sculptor, but is to be regarded as a manufacture of marble, subject to a duty of 50 per cent. *ad valorem*. Invoices of statuary from foreign countries, to be admitted at a duty of 10 per cent. *ad valorem*, therefore, must be accompanied by a certificate from the artist, declared to before a consular officer of the United States, showing that the former is a professional sculptor or statuary, wherever practicable."

Under date of February 6, 1880, (Synopsis of Decision, 4416,) the treasury department states that "the consuls discussed the subject in the light of the decision of this department of the twenty-seventh of October, 1879, which had for its object a definition of the word 'statuary' as used in the law, which declares that that term shall be held to include only the professional production of a statuary or of a sculptor. A distinction was therein made between figures



which were the work of mere artisans and those produced by artists; and to admit figures which were the productions of professional artists, it was held necessary that a certificate from the artist, declared to before a consular officer of the United States, should accompany the invoice. From the report of the consul at Carrara, it appears that large numbers of persons are engaged in business at Carrara, manufacturing cemetery figures representing Hope, Faith, Gratitude, Sailor Boy, and other like productions, which are made by workmen under their control, and that they turn out duplicates of these figures in any desired quantity, and that they are held for sale accordingly. The consul at Carrara designates this character of work as 'slop-work,' a term aptly descriptive of it, viewed from an artistic sense. It evidently was not the design of congress, when enacting that statuaries, the professional production of a sculptor or statuaries, should be admitted at a duty of 10 per cent., to favor the importation at that rate of duty of this class of merchandise.

"The terms 'professional productions of a sculptor' and 'productions of a professional sculptor' are considered as having the same signification, and the articles must be the productions of a professional sculptor or statuaries, in the true definition of that term, in order to be admissible at a duty of 10 per cent. Professional artists are understood generally to execute figures to the best of their ability, either upon an order given for a special production, or according to their own conception, wrought out after months of patient labor. This department, therefore, holds that the class of work specially alluded to by the consul at Carrara, and before described, is not the production of a professional sculptor, and that consular officers should refuse to give the certificate required by the decision of October 27, 1879, in such cases. The consul at Rome, referring to the character of marble figures largely shipped from Carrara to this country, states that they are made by men who call themselves professional sculptors, but that they are not real works of art, and are, in fact, nothing but manufactures of marble made by good artisans. The following is an extract from his dispatch, further in pursuance of the subject:

"From an artistic point of view—and it seems to me that this would also meet the needs of the revenue in part—I should be disposed to consider as marble manufactures, and not as works of art as meant by the law, all works coming from a business house, whether a single individual or a firm, and especially the latter, and not from the studio of a single sculptor. It would be for business purposes, for the purpose of manufacture, and not for art, that several sculptors would combine into one firm or establishment. Such a business house could readily be distinguished by its sign, by its clerks, by the printed headings of its bills, and by the knowledge of its business which, with a little patience, could readily be gained by the consul."

"These views correspond with those entertained by this department, and consular officers generally, when considering the subject of granting certificates under the circular of June 10, 1879, should act in accordance with the general views herein expressed."

*Edward Shippen*, for plaintiff.

*John K. Valentine*, Dist. Atty., for defendant.

MCKENNAN, C. J. This suit was brought to recover back alleged excessive duties exacted upon the importation of a number of pieces

of statuary. A special verdict has been found which presents the single question whether the duty imposed and paid is authorized by law. This question is to be answered by determining the meaning of section 2504, Schedule M, of the Revised Statutes, which is as follows:

"Paintings and statuary, not otherwise provided for, 10 per centum *ad valorem*. But the term 'statuary,' as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or sculptor only."

The object of the act is doubtless to encourage a taste for art, and hence to admit the work of professional artists at a low rate of duty. The plain meaning, then, of the words of the section would seem to be that dutiable statuary shall include all the artistic work of a professional statuary or sculptor produced in the exercise of his profession.

But it is urged that only the artist who conceived the ideal of the corporealized image is entitled to the benefit of the low duty, and hence that the statuary or sculptor who has modeled the work which he or others have finished is alone within the category of the section. We cannot accept this construction of the section, because it involves an arbitrary restriction of the common and well-understood meaning of its words. A sculptor is "one whose occupation is to carve wood, stone, or other material into images or statues." A statuary is "one who professes or practices the art of carving images or making statues." The "professional productions" of a statuary or sculptor are the practical results of the practice of his profession or occupation. In other words, they are "images or statues" produced by the exercise of his professional skill.

In this sense of the words of the statute it clearly embraces all the artistic work of a statuary or sculptor who pursues the employment of his class as a profession. We cannot otherwise construe them without wrenching them from their generally-accepted signification. We cannot adopt metaphysical or speculative definitions of them which have this effect; nor can we change the meaning of the statute by injecting into it a word or words which the legislature has thought proper to omit, and which is obviously necessary to authorize the construction contended for by the defendant.

All the statues described in the special verdict, except those of the two boys, are confessedly comprehended by either of the contested constructions of the statute, and are, therefore, subject to a duty of only 10 per cent. *ad valorem*. The two boys were executed from antique

models, but they were the product of the labor and skill of professional sculptors, and hence were their "professional productions," within the purview of the law, and are subject to the same rate of duty with the others.

Judgment is therefore directed to be entered on the special verdict in favor of the plaintiffs for \$242.40, with interest from March 30, 1880.

A writ of error from the supreme court of the United States has been taken in the above case.

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*In re PULSIFER and others.*

(District Court, N. D. Illinois. July, 1880.)

**1. PROMISSORY NOTES—RIGHTS OF HOLDER.**

A holder of promissory notes can only collect from the surety what remains due on the notes after deducting the amount received from the principal debtor.

**2. BANKRUPTCY—PROOF OF CLAIM BY CREDITOR.**

A creditor has no right to prove his debt and receive dividends on any more than the amount of the bankrupt's liability; so a bankrupt indorser is liable only for the balance due on notes indorsed by him after deducting the amount paid by the maker of the notes.

**3. STATE STATUTES—NO EXTRATERRITORIAL OPERATION.**

The holder of dishonored notes cannot import into his state the statutes of another state relating to the protest of negotiable paper. Such statutes are purely local regulations, enforceable only in the state where the statute prevails, and are not such a part of the contract as to be chargeable to the bankrupts on their contract of indorsement or guaranty.

*In Bankruptcy.*

*H. B. Hopkins, in favor of motion.*

*Rosenthal & Pence, for claimant.*

BLODGETT, D. J. The facts bearing upon the question raised are substantially these:

In August, 1877, the firm of Pulsifer & Co., who were bankers at Peoria, in this district, were adjudged bankrupts in this court. Soon after this adjudication, and some time in the month of August, 1877, the Bank of Commerce proved and filed with the register to whom the case had been referred, a claim against the estate of the bankrupts, based upon three promissory notes indorsed by the bankrupts as follows: (1) One note of Woolner Brothers, of Peoria, for \$15,000, dated February 26, 1877, and payable to the said Pulsifer & Co. in four months after date, and indorsed to the bank, "Pay Bank of Commerce. S. Pulsifer & Co." There was also indorsed on the back of this

note an absolute guaranty, by bankrupts, of the payment of this note, with interest at the rate of 10 per cent. per annum after due, but which, in the view I take of the case, cuts no special figure in the questions raised here. (2) A note of Woolner Brothers for \$15,000, dated June 2, 1877, and payable to Pulsifer & Co. 90 days after date, indorsed by Pulsifer & Co., "Pay Bank of Commerce. S. Pulsifer & Co." (3) Note of Woolner Brothers for \$10,000, dated May 11, 1877, payable four months after date, indorsed, "Pay T. C. Van Blarcum, Acting Cashier. S. Pulsifer & Co.;" Van Blarcum being, at the time of such indorsement, acting cashier for the bank, and the indorsement being for the benefit of the bank.

On the eighth day of March, 1878, a supplemental proof of said claim was made and filed; and this application involves the sufficiency of the claim as shown under the original and supplemental proof. Proof has been taken under the thirty-fourth rule, and an issue made and certified into court upon the said application.

The questions raised by the issue are as to the amount for which the bank is entitled to prove its claim under said notes. The claim as proven was for the full face of the three notes, \$40,000, with interest on the first note after due as per stipulation in bankrupts' guaranty indorsed on note, \$40,270; statutory damages of 4 per cent. under Missouri statute, \$1,600; total, \$41,870.

By the supplementary and amended proof, the bank gave credit for the sum of \$1,410.07, standing on its books to the credit of Pulsifer & Co. at the time of their bankruptcy, which the bank had retained and credited on this indebtedness.

About the time that the firm of Pulsifer & Co. were adjudged bankrupts, proceedings in bankruptcy were also commenced in this district against the firm of Woolner Brothers, the makers of the notes in question, and said firm made a proposition for composition on payment of 30 per cent., which was accepted by their creditors, and the bank, as the holder of the paper now in question, was, by express agreement with the trustee of Pulsifer & Co., approved by this court, allowed to accept this composition without prejudice to its claims against the Pulsifer estate as indorsers of said note.

This composition by Woolner Brothers was paid in full by two installments half on October 18 and half on November 21, 1877. The total amount received and applied by the bank on these notes, under the Woolner composition, was \$12,224.25. But in making its supplemental proof in March, 1878, although the bank had then received the 30 per cent. on the notes from the Woolners, it makes its proof for the full face of the notes as they stood at the time Pulsifer & Co. were adjudged bankrupts, and the 4 per cent. statutory damages, claiming that the bankrupts' estate was not entitled to credit for the amount received from Woolners "until the dividends from bankrupts' estate have paid 70 per cent. of the whole claim."

The questions now presented upon the application to reduce this claim, as it is asserted in the supplemental proof, involves the right of this creditor (1) to prove its debt and draw dividends from the

bankrupts' estate for the full amount due on the notes, without deducting this payment made by the Woolners; (2) the right of this creditor to prove the 4 per cent. statutory damages allowed the state of Missouri to be collected by the holder of a dishonored negotiable bill of exchange or note against the maker or indorser, "in lieu of charges of protest, and other charges and expenses." 1 Rev. St. Mo. c. 10, § 544.

There is no doubt that it has been repeatedly held, under our bankrupt law, that even if the holder of a note has received a sum of money from an indorser, he may nevertheless prove it in full against the estate of the maker in bankruptcy, and collect as much as he can, and any surplus he may receive over the amount actually due the holder, will be held in trust for the indorser or surety. *Ex parte Talcott*, 9 N. B. R. 502; *In re Weeks*, 13 N. B. R. 263; *In re Ellerhorst & Co.* 5 N. B. R. 144; *Downing v. Traders' Bank*, 11 N. B. R. 371.

And the right to prove the full amount of these notes against the estate of the bankrupt is insisted upon on the authority of these and analogous cases. But here the bankrupts are only sureties on these notes. Woolner Brothers are the principal debtors, and the bankrupts only made themselves contingently liable, on their contract as indorsers, to pay in case the makers did not.

It is very clear to me, therefore, that the bank, as the holder of these notes, can only collect from the surety what remains due on the notes after deducting the amount received from the principal debtor. The same rule must apply in the case as would hold if a suit at law had been brought by the bank against the bankrupts as indorsers of this paper. If the notes had been proved by the bank as holders against the estate of Woolners, the right to prove in full, notwithstanding payments received from the indorsers, would be manifest, because any excess collected would be held for the benefit of the surety; but an excess collected from these bankrupts could not be held in this case for the benefit of the makers; and it is obvious that, as against the other creditors of the bankrupts, this creditor has no right to prove its debt and receive dividends on any more than the amount of the bankrupts' liability on the paper.

I am, therefore, of opinion that the claim must be reduced by the reduction of the Woolner payment.

As to the claim for 4 per cent. statutory damages, it is admitted that the notes in question were made in this state; that the makers

and payees reside here; that the bank was the St. Louis correspondent of the bankrupts; and that the bank discounted the notes in due course of business, upon request of bankrupts. The notes having been dishonored, can the bank import into this state the Missouri statute regulating the damages to be recovered by the holder of protested negotiable paper, and have these damages allowed him here? This is purely a local regulation, enforceable only in the state where the statute prevails, and does not, in my view, become so far a part of the contract as to be chargeable to the bankrupts in this state on their contracts of indorsement and guaranty.

The statutes passed by the various states regulating the damages to be recovered by the holders of negotiable paper, vary so much that such a rule of damages against indorsers or makers upon this class of paper would be so variable that no party putting afloat a piece of negotiable paper could tell what his liability would be. I find no express authority bearing directly on this question save the case of *Fiske v. Foster*, 10 Metc. 597, where the supreme court of Massachusetts held that the statute of the state of Maine, regulating the damages upon suits between parties to negotiable paper, should have no extraterritorial operation. The reason on which the decision was made seems to me sound, and I do not find that the case has been doubted or overruled.

An order will, therefore, be made reducing the claim by the amount paid under the Woolner composition and the amount of the statutory damages.

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### HUMPHREYS' SPECIFIC HOMEOPATHIC MEDICINE Co. v. WENZ.

(Circuit Court, D. New Jersey. November 24, 1882.)

1. TRADE-MARK—NUMBERS.

Numbers constitute a lawful trade-mark when they indicate origin or proprietorship, and are used in combination with words and other numerals.

2. SAME—WORDS.

The words "homeopathic specifics," standing alone, cannot be appropriated as a trade-mark; but can be when used in connection with serial numbers.

3. NUMBER ALONE MAY BE EMPLOYED.

The complainant was the first to adopt such a method of putting up homeopathic medicines, and by reason thereof certain specific remedies have come to be known in the trade by numbers alone.

## 4. SAME—VIOLATION BY IMITATION OF.

The use of another name, such as "Reeves' improved," in place of "Humphreys'," before the words "homeopathic specifics," does not take the defendant out of the class of imitators; such prefix does not meet the difficulty, as the remedies are purchased by the public by the numbers alone, and the defendant has made use of such numbers.

## 5. RESEMBLANCE—INTENT TO DECEIVE AND MISLEAD.

If the resemblance is such as not only to plainly suggest an intention to deceive, but is calculated to mislead the public, who are purchasers of the article, and thus to injure the sale of the goods of the proprietor of the original device, the injured party is entitled to redress.

## In Equity.

*A. J. Todd and A. Q. Keasbey*, for complainant.

*J. Frank Fort*, for defendant.

NIXON, D. J. The bill of complaint filed in the above case alleges that the complainant is a corporation, organized under the laws of the state of New York, by the name and title of "The Humphreys' Specific Homeopathic Medicine Company;" that for upwards of 20 years past it has manufactured and sold a series of 35 homeopathic specific medicines or remedies, which have been put up in bottles containing thereon labels and wrappers having printed thereon the words "homeopathic specific," in connection with numbers in a series, and particular reference to diseases or infirmities for which the medicines in the bottles are intended as specifics; that the complainant's designation of said series of homeopathic specific medicines is by the words "homeopathic specific," and by numbers in a series as follows: No. 1, fever, congestion, inflammations; No. 2, worm fever or worm disease; No. 3, colic, crying, and wakefulness of infants; No. 4, diarrhœa of children and adults; No. 5, dysentery, gripings, bilious colic; No. 6, cholera, cholera morbus, and vomiting; No. 7, coughs, colds, hoarseness, bronchitis; No. 8, toothache, face-ache, neuralgia; No. 9, headache, sick headache, vertigo; No. 10, dyspepsia, biliousness, costiveness; and so on, upwards, in the same serial order, to 35; that by reason of the use of numbers in serial order, in connection with the words "homeopathic specific," the books and pamphlets of the complainant, descriptive of its homeopathic specifics, and the directions therein contained relating to their use, could be referred to by the defendant in the sale of his "homeopathic specifics," and such books could be used with the defendant's medicines to a large extent in the treatment of diseases, with the serial order of specifics put up and sold by him, equally as well as with the serial order of specifics put up and sold by the complainant.

The bill further claims that the complainant was the first to use specifics in homeopathy, and the first to adopt the term "homeopathic specifics," and to use in connection with these words numbers to designate the medicines and the diseases for which such medicines are intended as specific; that such adoption is not descriptive, but denotes origin and ownership; that the use of said numbers in connection with these words is wholly arbitrary, as symbols to denote origin and ownership; that such use has become so acknowledged and acquiesced in by the public that the specifics are now known by numbers only, and are ordered and called as such, instead of by the names of the particular complaints or diseases or remedies therefor; and that its medicines thus put up in bottles labeled as "homeopathic specifics," and numbered in series, have acquired a high reputation throughout the United States and have commanded and still command an extensive sale, and have become a great source of profit to the complainant.

The charge is that the defendant has infringed the complainant's trade-mark by taking bottles of about the size of complainant's, putting labels thereon, and printing in conspicuous letters the words "homeopathic specifics," and numbering the series from 1 to 40, as the complainant's are numbered from 1 to 35; that in regard to the most usual remedies for the most common complaints or diseases he has adopted the same numbers for the same diseases, that complainant has used for many years; and that the effect of such imitations is to deceive the public by making purchasers believe, when buying the specifics of the defendant, that they are obtaining the complainant's remedies.

An application is now made for an injunction to restrain the defendant, *pendente lite*, from the continued use of such labels in connection with numbers.

The case presents an interesting question. A trade-mark is any proper mark by which goods and wares of the owner or manufacturer are known in the trade. Courts of equity have two objects in view in granting injunctions against their imitation: (1) To secure to the individual adopting one the profits of his skill, industry, and enterprise; (2) to protect the public against fraud. There are limitations upon the devices or symbols that may be adopted. To be lawful they must have reference to origin or ownership, and not to quality. They must not be of such a character that their use will give a monopoly in the sale of any goods other than those produced by the person



who invokes the protection of the court. Mere numbers are never the objects of a trade-mark, where they are employed to indicate quality, but they may be where they stand for origin or proprietorship, in combination with words and other numerals. These principles are elementary, and have been stated in order to test the case by them.

It cannot be successfully maintained that the words "homeopathic specifics," standing alone, can be appropriated by any one as a trade-mark; they are too broad, and if allowed would give the taker a monopoly in a school of medicine which Hahnemann, its founder, threw open to all disciples. *Canal Co. v. Clark*, 13 Wall. 311.

A "specific" in medicine, says Dunglison, is a substance to which is attributed the property of removing directly one disease rather than any other. A "homeopathic specific," therefore, is a remedy pertaining to homeopathy which exerts a special action in the prevention or cure of a disease. The name can no more be appropriated, and is no more the property of Humphreys, than any other practitioner of the homeopathic system of therapeutics. But I do not understand that the complainant's solicitor claims this. What is contended for is the right to use these words in connection with serial numbers. Humphreys was the first to adopt such a method of putting up homeopathic medicines, and the proof is that certain specific remedies for particular complaints or diseases have come to be known in the trade by the number which he adopted to designate them; that the defendant has in several instances applied the same numbers to the same remedy; and that such an imitation is calculated to impose upon unwary purchasers, who are in the habit of buying Humphreys' specifics by the numbers with which he indicates them.

The defendant insists that the use of the words "Reeves' improved" before "homeopathic specifics," takes him out of the class of imitators or infringers, as they sufficiently reveal to purchasers that they are not getting Humphreys' remedies; but that prefix to "specifics" does not meet the difficulty, which is that some of these remedies are purchased by the public by numbers, and that he has copied the complainant's numbers for the same alleged specifics. Besides, it is now well settled that to entitle the proprietor of a trade-mark to relief, or to establish a case of infringement, it is not necessary to show that the imitation is exact in all particulars. If the resemblance is such as not only to plainly suggest an intention to deceive, but is calculated to mislead the public, who are purchasers of the article, and thus to injure the sale of the goods of the proprietor of the original device, the

injured party is entitled to redress. *Walton v. Crowley*, 3 Blatchf. 440.

It is difficult to believe that there was no intention to deceive in this case, although the defendant swears that adopting the same numbers which Humphreys has used was purely accidental. He states in his affidavit "that the names of diseases claimed to be cured by the remedies of the defendant are different by the numbers from those of the complainant, and that whatever similiarity there may be in diseases and numbers arises from accident and not intention."

Humphreys' specifics for fevers, diarrhea, colds, dyspepsia, rheumatism, whooping-cough, gravel, nervous debility, urinary difficulties, painful menses, and epilepsy, are respectively numbered, 1, 4, 7, 10, 15, 20, 27, 28, 30, 31, and 33. The defendant has printed his list with the same diseases or complaints designated by precisely the same numbers. If this was accident and not intention it is one of the most remarkable coincidences that ever occurred, and is a serious tax upon human credulity.

A preliminary injunction must issue against the defendant, restraining him from using the above numbers, in connection with the remedies for the above diseases or complaints, until the further order of the court.

See *Burton v. Stratton*, 12 FED. REP. 696, and note, 704; *Shaw Stocking Co. v. Mack*, Id. 707, and note 717; *Ginter v. Kinney Tobacco Co.* Id. 782; *Wm. Rogers Manuf'g Co. v. Rogers Manuf'g Co.* 11 FED. REP. 495; *Singer Manuf'g Co. v. Riley*, Id. 706; *Hostetter v. Adams*, 10 FED. REP. 838.

GAMEWELL FIRE-ALARM TELEGRAPH CO. v. CITY OF BROOKLYN.\*

(Circuit Court, E. D. New York. November 15, 1882.)

1. PATENT—LICENSE FOR PARTICULAR INVENTION.

The holder of a right to make, use, and vend a patented invention "for the following purposes, and no others,—that is to say, for the purpose of constructing and operating telegraph wires and instruments within the corporate limits of any of the incorporated cities or villages, or other incorporated municipalities analogous to cities and villages, in any of the states and territories of the United States, when said telegraph lines and instruments are used solely by the municipal authorities for fire-alarms, or the transmission of police or other municipal intelligence,"—is merely a licensee for a particular employment of the invention.

2. SAME—DEMURRER WHERE LEGAL OWNER NOT MADE A PARTY.

In an action by such licensee for infringement, a demurrer on the ground that the owner of the legal title to the patent has not been made a party is well taken.

*B. S. Clark*, for complainant.

*John A. Taylor*, corporation counsel, (with whom was *Geo. Gifford*.) for the city of Brooklyn.

WALLACE, C. J. The complainant, by mesne transfers, is vested with the exclusive right to make, use, and vend the patented invention "for the following purposes and no others; that is to say, for the purpose of constructing and operating telegraph wires and instruments within the corporate limits of any of the incorporated cities or villages, or other incorporated municipalities analogous to cities and villages, in any of the states and territories of the United States, when said telegraph lines and instruments are used solely by the municipal authorities for fire-alarms or the transmission of police or other municipal intelligence." It appears by the bill that the Western Union Telegraph Company is the owner of all the right and interest in the letters patent which did not pass to the complainant.

The bill is demurred to upon the ground that the Western Union Telegraph Company is not made a party to the suit. The rule is unquestionably that where one person has the legal title to the patent, and another an equitable right therein, both must be made parties to the suit in an action in equity to restrain infringement. The legal title to a patent is that, and only that, recognized by the laws of congress which make the monopoly property, and regulate the mode of its transfer.

\*Reported by Robert D. & Wyllys Benedict.

The statutory power of assignment, as is said in *Littlefield v. Perry*, 21 Wall. 205, 219, "has been so construed by the courts as to confine it to the transfer of an entire patent, an undivided part thereof, or the entire interest of the patentee or an undivided part thereof throughout a certain specified portion of the United States." In that case there was in one instrument a conveyance of the entire patent, and there was also an instrument, executed concurrently, called a supplementary agreement, which contained a reservation of the right of the patentee to apply the invention himself to certain specified purposes. The two instruments were construed as a conveyance of the title to the patent, with a license back from the assignees to the patentee, and upon this construction the assignees were held as vested with the legal title. From the reasoning of the opinion it is evident, if there had never been a transfer of the patentee's right to the limited use of the invention, the interest transferred would not have been considered as vesting the statutory title in the assignees.

In the present case the transfer was only of a right to use and vend the invention for limited purposes in specified places; the right to use and vend it for general purposes remaining intact until it was conveyed to the Western Union Telegraph Company. The right transferred was not an undivided part of an entire patent, or an undivided part of the entire interest of the patentee in specified territory, but was a segregated right for a particular employment of the invention. The complainant was, therefore, merely a licensee, within the rule established in *Gayler v. Wilder*, 10 How. 477; the right transferred to him being less than that of the entire and unqualified monopoly.

The case of *Ingalls v. Tice*, 13 Reporter, 676, is directly in point. There the transfer to the complainant was of the sole and exclusive right to sell the patented article in certain specified territory, and as the right of the patentee to make and use the invention did not pass by the instrument, it was held that complainant did not acquire the legal estate, and, the patentee not having been made a party to the suit, a demurrer for that reason was sustained.

The demurrer is well taken, and judgment is ordered for defendant, unless complainant, within 30 days, amends his bill by bringing in the Western Union Telegraph Company as a party. The defendant is entitled to costs of the demurrer.

ALLEGHENY BASE-BALL CLUB v. BENNETT.\*

(Circuit Court, W. D. Pennsylvania. November 18, 1882.)

EQUITY—SPECIFIC PERFORMANCE—PERSONAL SERVICES.

Respondent, on the third of August, 1882, signed an agreement, in consideration of \$100, by which he bound himself to execute a formal contract to give his personal services as a base-ball player to complainant during the season. Subsequently, respondent refused to sign the formal contract, and was about to sign a contract obligating himself to give his services to a rival base-ball club. Complainant filed a bill to compel respondent to execute the formal contract with him as agreed, and to restrain him from executing the agreement with, and giving his services to, the other club. *Held*, on demurrer, that the bill must be dismissed.

In Equity. Bill to enforce compliance with agreement to enter into contract to give personal services.

Bill in equity by the Allegheny Base-ball Club, a corporation of Pennsylvania, against Charles W. Bennett, a citizen of Michigan, to compel the respondent to execute a formal contract to give his exclusive services as a base-ball player to the complainant during the base-ball season of 1883, and also for an injunction to restrain him from executing a like agreement with the Detroit Base-ball Club, and from performing such services for any other person or corporation than the complainant during the season named.

The bill was filed on the fifth day of October, 1882, and was based upon the following written instrument, to-wit:

It is hereby agreed, this third day of August, 1882, between the Allegheny Base-ball Club and Charles W. Bennett, that said Charles W. Bennett hereby promises and binds himself that between the fifteenth and thirty-first days of October, 1882, he will sign a regular contract of the Allegheny Base-ball Club, a chartered company belonging to the American Association of Base-ball Clubs, which contract shall bind him to give his services as a base-ball player to said club for the season of 1883, and shall bind said Allegheny Club to pay him the sum of \$1,700 for and during such season of 1883; and in consideration of his agreement to sign such a contract in October, the sum of \$100 is now paid to said C. W. Bennett, the receipt of which is hereby acknowledged. Witness our hands and seals this third day of August, 1882

THE ALLEGHENY BASE-BALL CLUB, by

A. G. PRATT,

Witness.

H. D. McKNIGHT, President. [Seal.]

C. W. BENNETT. [Seal.]

The bill averred substantially that the complainant was engaged in the business of playing base-ball for profit, and that by the expend-

\*From the Pittsburgh Legal Journal.

iture of much time and large sums of money it made preparations for the exhibition of such games, and expected to receive large returns from the same; that the respondent was a skillful player of baseball, and, in consequence of his agreement with complainant, E. N. Williamson and James F. Galvin, two other skillful players, had entered into a similar agreement with complainant; that respondent had refused to sign the "regular contract" referred to, and had entered into a like contract with the Detroit Base-ball Club; that, accordingly, Williamson and Galvin refused to keep their said engagement with complainant, and that the base-ball season had now so far advanced that complainant could not secure other players of equal skill with said Bennett, Williamson, and Galvin, whereby complainant "would be seriously damaged, to an amount of not less than \$1,000."

The bill prayed that Bennett be required to sign the "regular contract," and perform his covenants, and also that he be restrained from entering into a similar contract with the Detroit Base-ball Club, or any other association or person, and from playing base ball "for hire," during the base-ball season of 1883, for any other than complainant.

The complainant moved for a preliminary injunction. The motion was argued by James Bakewell, and was opposed by A. Tausig, and was denied. The respondent then filed a general demurrer, on the grounds—

(1) That the bill was prematurely brought; (2) that the agreement was a mere preliminary arrangement, anticipating the making of a final contract, and that, therefore, there was no contract before the court capable of specific enforcement; (3) that the agreement was unlimited as to place, and was, therefore, unreasonable and void as against public policy, as covenants in restraint of trade; (4) that the complainant had an adequate remedy at law.

*A. Tausig, A. W. Duff, and Marshall Brown*, for the demurrer.

To maintain a suit there must be a cause of action when such suit is commenced. 55 Ga. 329; 29 Ill. 497; 4 Sneed, (Tenn.) 583. One who has anything to do on a particular day has the whole of that day to perform such act, so that suit for a breach of performance cannot be instituted until the next day. 102 Mass. 65; 6 Watts & S. 179; 18 Cal. 378. And, in general, the time within which a contract is to be executed is as much the essence of it as any other part. 6 Wis. 120; 43 Me. 158; 18 Ind. 365; 17 Me. 316; 22 Me. 133.

1. The present bill for an injunction to restrain the defendant from playing with the Detroit Club, as in violation of the alleged agreement, will not lie for the reason the contract is a mere preliminary arrangement, and not a final agreement. What are the terms of the alleged contract? They provide and contemplate the execution of a regular agreement, in order to bind the parties and render the contract mutual, final, and conclusive. The preliminary contract shows that it was executed with reference to a future and final agreement between the parties. A contract requires mutuality as to all its essential terms, stipulations, and conditions. Is there any allegation upon the face of the bill that a final, regular contract was ever agreed upon between the parties? There is no contract, therefore, capable of being enforced in a court of equity, and the present bill must be dismissed. *South Wales Ry. Co. v. Wythes*, 5 De Gex, M. & G. 888. Specific performance will not be decreed if it is not clear that the minds of the parties have come together. *Wistar's Appeal*, 80 Pa. St. 484.

2. Specific performance will not be enforced, directly or indirectly, unless the agreement is *mutual*, its terms *certain*, its enforcement practicable, and the complainant is without adequate redress in an action at law, (Bispham, Eq. § 377, and cases cited; 10 Wall. 339; 5 De Gex, M. & G. 888;) and it will not be enforced when it is doubtful whether an agreement has been concluded, (14 Pet. 77; 81 Pa. St. 484;) nor where the duties are continuous and require skill and judgment, (10 Wall. 339.) A court of chancery will not decree the specific performance of a contract, where it would be impossible for the court to enforce the execution of its decree, or where the literal performance, if enforced, would be a vain and idle act. Bispham, Eq. 436.

3. Even if the alleged contract is legal and binding on the defendant, the demurrer should be sustained, because the plaintiff has an adequate remedy at law. It may have to pay a higher salary to secure a player of Bennett's skill, and the difference would be the measure of damages for breach of contract.

4. Even if the court should be of the opinion that a contract was executed, full, final, and mutual as to all its terms, conditions, and stipulations, and also of opinion that negative covenants not to exercise a trade, profession, or calling within reasonable limits may be enforced by injunction, such conclusion would have no application to enjoin and restrain the defendant. The contract is unreasonable and void on grounds of public policy, as in cases of covenants in

restraint of trade, because it is unlimited. *McClurg's Appeal*, 58 Pa. St. 51; *Gillis v. Hall*, 2 Brewster, 342; *Catt v. Tourle*, Law R. 4 Ch. App. 654.

5. The demurrer should be sustained because equity will not indirectly enforce specific performance of a contract for personal services where the services require a succession of acts whose performance cannot be accumulated by one transaction, but will be continuous and require the exercise of special knowledge, skill or judgment. Pom. Spec. Per. § 312; *Ford v. Jermon*, 6 Phila. 6; *De Pol v. Sohlke*, 7 Rob. (N. Y.) 280; *Sanquiricio v. Benedetti*, 1 Barb. 315; *Kemble v. Kean*, 6 Sim. 333; *Hills v. Croll*, 2 Phil. 60; *Rolfe v. Rolfe*, 15 Sim. 88; *Fothergill v. Rowland*, Law R. 17 Eq. 132; *Kimberley v. Jennings*, 6 Sim. 340. The personal acts with respect to which courts of equity entertain jurisdiction to decree specific performance have reference to property of some kind. There is none where a contract for personal services alone has been *actively* enforced. There are several, however, in which the court has interfered *negatively*. Thus, in the case of a theater, considered as a partnership, a contract with the proprietors not to write dramatic pieces for any other theater is valid, and a violation of it will be restrained by injunction. *Clark v. Price*, 2 Wilson, 157; *Willard*, Eq. 278. But where there is no partnership between the parties, and the defendant has violated his engagement to one theater and formed a conflicting engagement with another, a court of equity will not interfere either *actively* to compel performance of one contract, or *negatively* to prevent the performance of the other. *Willard*, Eq. 278; *Kemble v. Kean*, 6 Sim. 333. The cases where injunctions have issued relate (1) to partnership agreements; (2) to property of some kind; (3) to express negative covenants. *Willard*, Eq. 277, 278.

6. If the court should be of opinion that the alleged contract is complete, mutual, certain, and final, and that under it the plaintiff has no full, complete, and adequate remedy at law, the present bill will not lie for the following reasons: (1) It is prematurely brought. No injury to plaintiff (if any) can arise until the ball season of 1883 commences. As the plaintiff will not be actively engaged under the alleged contract until the regular season of 1883 opens, no damage can result until that time from the act which it is sought to enjoin. (2) There is no right to, or necessity for, an injunction, for it cannot appear, at the present time, that defendant will play ball during the season of 1883, in violation of said alleged contract. *De Rivafrinoli v. Corsetti*, 4 Paige, 264; *De Pol v. Sohlke*, 7 Rob. (N. Y.) 283. If



the injury be doubtful, eventual, or contingent, equity will not enjoin. *Rhodes v. Dunbar*, 57 Pa. St. 274; *Huckenstein's Appeal*, 70 Pa. St. 108. If the alleged injury is only problematical, according as other circumstances may or may not arise, or if there is no pressing need for an injunction, the court will not grant it until a tort has actually been committed. *Kerr*, Injunc. 339.

*James Bakewell and J. S. Ferguson, contra.*

ACHESON, D. J., (*orally*.) Demurrer sustained and bill dismissed.

### KIRBY, Ex'r, etc., v. LAKE SHORE & M. S. R. Co. and others.\*

(*Circuit Court, S. D. New York. November 17, 1882.*)

#### 1. PARTNERSHIP—EXECUTOR OF DECEASED PARTNER SUING IN EQUITY.

An executor of a deceased member of a partnership may maintain a suit in equity to discover the amount due from defendant to such partnership, and to recover such amount when it appears that the surviving partner has refused to join in the suit.

#### 2. STATUTE OF LIMITATIONS—DISCOVERY OF FRAUD.

Under section 382 of the Code of Civil Procedure of New York, as construed by the highest court of the state, the statute of limitations begins to run from the time an account is settled, and not from the time of the discovery of facts showing that such settlement was fraudulently made.

#### 3. SAME—FOREIGN CORPORATION.

A foreign corporation cannot avail itself of the statute of limitations of this state.

#### 4. EQUITY—DISCOVERY—FOREIGN CORPORATION.

Where the officers of a foreign corporation are not made parties in an action against such corporation, there can be no discovery.

#### 5. SAME—NO RELIEF AGAINST SOME OF DEFENDANTS.

That no relief can be had against some of the defendants who were parties to a fraud, will not avail the other defendants.

*G. Norris*, for complainant.

*J. E. Burrill*, for defendants.

WALLACE, C. J. The bill is filed by the executor of a deceased member of the firm of Alexander & Co. for an accounting concerning moneys alleged to be due to that firm from the principal defendants. The bill alleges that between June 10, 1870, and March 4, 1871, the defendants transported for the firm of Alexander & Co. 2,028 car-loads of cattle under a contract which entitled the firm to be allowed certain sums by way of drawback on the monthly settlement of account between the parties, and that upon the monthly settlements which

\*Affirmed. See 7 Sup. Ct. Rep. 430.

took place the defendants concealed and misrepresented the accounts which were justly due to the firm by way of "drawbacks," and which were peculiarly within the knowledge of the defendants; and that by reason of the concealment and misrepresentation of the defendants the firm did not discover the truth until long after the transactions between the parties had been closed. The firm of Alexander & Co. dissolved, the copartnership indebtedness was liquidated, and the interests of the several partners in the assets were adjusted. Thereafter one of the members died and another member became a lunatic. The complainant, as executor of the deceased partner, requested the surviving partner to bring or join in a suit to recover the claim against the defendants, and also made a similar request to the conservator of the lunatic; and upon their refusal they were named as parties defendant. The bill prays for a discovery, as well as for a reopening of the accounts, and for a decree for the payment of the sums found due. Joint and several demurrers have been interposed by the principal defendants.

1. The objection that the complainant has no standing to maintain the suit is quite too technical to prevail in a court of equity, whose flexible rules regarding parties aim only to preserve the substantial rights of all who have a material interest in the controversy. Assuming that the right of action vested in the surviving partners originally, the complainant cannot be deprived, by their incapacity or refusal to act, of his right to recover his part of any sum that may be found to be due.

2. The point raised, that the statute of limitations began to run against the right of action when the accounts between the parties were settled, instead of from the time when the true facts were discovered by the firm of Alexander & Co., seems to be fatal to the bill, except so far as it affects the foreign corporation defendant. Inasmuch as courts of equity, in all cases in which their jurisdiction is concurrent with courts of law, obey the general statutes of limitation, the question whether this action is barred by limitation depends upon the law of this state as found in section 382 of the Code of Civil Procedure. That section is not luminous, and is certainly capable of the interpretation that actions on the ground of fraud, where the substantive relief sought is a money judgment, must be brought within six years from the time the fraud was committed. Any other construction would authorize the pleader, by the form of action he might elect, to postpone and defeat the running of the bar. But the meaning of the section has been settled in *Carr v. Thompson*, 87 N. Y. 160; and the

interpretation there placed upon it by the highest court of the state must control the present case, it having been held that an action precisely like the present in principle and structure is within the six-years' limitation, irrespective of the time of the discovery of the facts.

3. The foreign corporation defendant cannot avail itself of the statute of limitations of this state. *Olcott v. Tioga R. Co.* 20 N. Y. 210; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157. Nor does the bill disclose a case where there have been such gross laches in the assertion of the demand as to permit this defendant to invoke the doctrine of an equitable bar to the suit. The allegations of fraudulent concealment, and of misrepresentations, are very material, as where such circumstances exist courts of equity grant relief after a long lapse of time. *Michael v. Girod*, 4 How. 560.

4. Eliminating the defendants against whom the action cannot be maintained, there can be no discovery, because the officers of the foreign corporation are not made parties and the corporation cannot be sworn. Story, Eq. Pl. § 235. The demurrers as to discovery will, therefore, be sustained.

5. The circumstance that no relief can be had against some of the defendants who were parties to the alleged fraud, does not avail the other defendants. Their presence in the controversy is not indispensable. No one need be made a party against whom there can be no decree, unless a final decree cannot be made without affecting the rights of the absent party.

The conclusions thus briefly expressed will sufficiently indicate to counsel which of the several demurrers are allowed, and which are overruled.

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#### UNITED STATES v. ALLEN and others.

(Circuit Court, M. D. Tennessee. October, 1882.)

#### INTERNAL REVENUE—SALE UNDER DISTRESS WARRANT VOID.

The provisions of sections 3184 and 3185 of the Revised Statutes must be *strictly construed and literally followed*, and when land has been sold and bid in by the United States for taxes due from a firm of distillers in 1867, but not assessed until the interest and penalty exceeded the tax, and not enforced until 1876, and no formal notice and demand of payment could be proved, the United States acquires no title, and a conveyance made before such sale to an innocent purchaser will not be set aside.

In Equity.

*A. McClain*, U. S. Atty., and *J. R. Dillon*, Asst. Dist. Atty., for plaintiff.

*J. W. Newman*, for defendants.

KEY, D. J. The bill in this case is filed to remove a cloud upon the title of the United States to the real estate described in the bill. Alexander & Co. were distillers in Lincoln county, Tennessee, in 1866-7. They were assessed on the July list for 1867 the sum of \$3,057.16; the tax so assessed, and interest and penalty thereon, amounted to said sum. On the twenty-first day of January, 1876, the collector issued his distress warrant for the collection of this money, in which he recites that more than 10 days had elapsed since the payment of said taxes was demanded. This warrant went into the hands of W. B. Nicks, a deputy collector, and on the twenty-second day of January, 1876, he levied the warrant upon the real estate claimed in the bill as the property of E. L. Allen, a member of the firm of Alexander & Co. It is stated in said levy that demand of payment of said tax had been made on the second of January, 1869, and also on the seventeenth of December, 1875. The lands were sold and bid in for the United States, and a collector's deed executed therefor in September, 1877. On the fourteenth day of January, 1876, Allen had conveyed this property to C. S. Wilson, and the bill is filed to declare this deed void (1) because the taxes were due and had been demanded before the execution of the deed to Wilson; and (2) because it was made to hinder and defraud the government in the collection of its debt.

The first question to determine is whether the United States has title to these lands. The earlier proceedings, upon which this title rests, were during a period when the internal-revenue laws were little understood in this region of the country by the parties against whom taxes were assessed, or the officers charged with the assessment and collection of these taxes. The record in this case furnishes abundant evidence of that fact. The title of the government rests upon a lien of an extraordinary nature. The lien provided by the law is a lien upon personal property as well as land. It is a lien on property in possession, and upon all rights to property depending on contracts and unexecuted contracts. It not only creates a present lien, but it relates back. The demand may be made long after the maturity of the tax, and will create a lien which relates back and establishes itself upon the property. 4 Dill. 71. There is no limit as to the time, so that innocent parties and purchasers may be involved and ruined. The assessment is *ex parte*. The party against whom the

tax is assessed has no opportunity to resist or combat it. The demand for payment is his notice, and this is after an assessment which has the force of a judgment awarding *fi. fa.* The levy of the warrant, the sale, and the collector's deed all follow without affording the tax-payer any forum for opposition, and it is only when a judicial tribunal is invoked to place the purchaser in possession that he whose property has thus been sold is in a condition to be heard. The law upon which such titles are predicated will be strictly construed. Failures to comply with its provisions will not be cured by presumptions and intendments. The steps required must be literally taken, and must be made evident by clear and conclusive testimony. In order to support and enforce a statutory lien for taxes, all the prerequisites of the law granting the lien must be strictly complied with. *Thacher v. Powell*, 6 Wheat. 119; *Parker v. Rule's Lessee*, 9 Cranch, 64; *Early v. Doe*, 16 How. 610.

Section 3184, Rev. St., says:

"Where it is not otherwise provided, the collector shall in person or by deputy, within 10 days after receiving any list of taxes from the commissioner of internal revenue, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes, and demanding payment thereof. If such person does not pay the taxes within 10 days after the service or sending by mail of such notice, it shall be the duty of said collector, or his deputy, to collect said taxes, with a penalty of 5 per cent. additional upon the amount of taxes, and interest at the rate of 1 per centum per month."

Section 3185, Rev. St., provides that all returns to be made monthly, by any person liable to tax, shall be made on or before the tenth of the month, and the tax assessed shall be returned by the commissioner of internal revenue by the last of the month; and that all returns for which no provision is otherwise made shall be made on or before the tenth of the month succeeding the time when the tax is due and liable to be assessed, and shall be due and payable on the last of the month in which the assessment is made, and if not paid, the penalty and interest follow non-payment;—

"Provided, that notice of the time such tax becomes due and payable is given in such manner as may be prescribed by the commissioner of internal revenue. It shall then be the duty of the collector, in case of the non-payment of said tax on or before the last day of the month as aforesaid, to demand payment thereof, with 5 per centum added thereto, and interest at the rate of 1 per centum per month as aforesaid in the manner prescribed by law; and if said tax, penalty, and interest are not paid within 10 days after such demand, it shall be then lawful for the collector or his deputy to make distraint therefor as provided by law."

The proceedings in this case were under these sections; it so appears from their face. The law requires diligence of the officers charged with its execution, but in the case before us the taxes became due and payable in July, 1867, and amounted to \$1,484.70. They were not assessed, and the penalty and interest fixed, until said penalty and interest amounted to \$1,573.10,—a sum larger than the tax. The distress warrant did not issue until the twenty-first of January, 1876, seven years after the taxes accrued. Allen had purchased and sold property in the mean time, and the rights of innocent persons had intervened. There was great and inexcusable laches on the part of the officers of the government, and while this may not affect the title of the United States to the property, it does not add weight to its equitable remedy, but on the contrary furnishes an additional reason why strictness should be required in the steps necessary to support the title.

Unquestionably, a demand on the part of the collector or his deputy of the payment of the tax, penalty, and interest, was a necessary prerequisite. This is so regarded by the United States, for the commissioner of internal revenue has by regulation provided not only a form of demand, but of the notice which must precede it. There must be, under the proviso in section 3185, not only a demand, but it must be preceded by a notice of the time when such assessment becomes due and a demand for payment. Is the required demand established clearly, satisfactorily, in this record? The distress warrant recites that "more than 10 days had elapsed since said taxes were demanded." The return of the deputy collector says that demand was made on the second of January, 1869, and also on the second of December, 1875. These recitals are sufficient to establish *prima facie* a demand, but is not this *prima facie* case overturned by the proof? There is no record or writing anywhere sustaining these recitals. The warrant was issued January 21, 1876, and levied the following day. Seven years had passed between the first demand and the levy containing the recital of the demands. Ramsey, who was collector in 1869, had gone out of office, had been succeeded by Mullens, and Mullens in turn had been succeeded by Bryant. The deputy collector in 1869 was named Farrar. In 1876 that place was filled by Nicks. Ramsey does not prove any demand in January, 1869. He says that he made various demands, verbally and in writing, by himself and by his deputy, Farrar, and that these demands were made from the latter part of 1867 through the year 1868. He proves no demand in 1869. Farrar, Bryant, and Nicks are not ex-

amined to prove a demand. I take it that as complainant's title on its face, rests on the demands of January, 1869, and December 1875, these demands must be established, or at least one of them. A failure to do this would not be cured by proving other demands, but if it were the other demands are not sufficiently proven. The demand required is not an informal one—a mere dun. It must be formal and specific. The law requires that within 10 days after receiving his list of taxes from the commissioner of internal revenue the collector or his deputy shall give notice to each person liable to pay taxes, to be left at his dwelling or place of business, or sent by mail, stating the amount of taxes and demanding payment thereof. Section 3184, Rev. St. The notice must be in writing or print, or it could not be so left or sent by mail, and it must be given in one or the other methods. Not only so, but it must state the amount of taxes and demand payment thereof. How could Nicks know or ascertain that these things had been done seven years before, when there is no record, book, or paper anywhere showing the fact, nor proof of any one establishing it? Nor does his recital of the demand of December, 1875, have any better support.

Titles should not be divested out of owners and purchasers in proceedings like those, where so much laches, carelessness, and uncertainty appears. It is not necessary to discuss the question as to whether a defective prior demand would be cured by a subsequent one made in due form, as in my opinion neither demand is satisfactorily established in fact. To escape this conclusion the district attorney earnestly, ably, and with great force argues that the assessment in this case was under section 3253, Rev. St., in which no such formality of demand is required as in sections 3184, 3185; that these sections in terms only apply to cases where no other method is provided; and it is insisted that another method is given in section 3253 in a case like this. It is true that the liquors were illegally removed, but in this the collector and his deputy joined Alexander & Co. All the parties concerned were ignorant of the law applicable in such instances, and the letter of the commissioner of internal revenue, dated February 18, 1876, treats the removal as having been made in an "informal manner," and not as working a forfeiture of the spirits. They were simply taxed as though the removal had been legal. In case of a legal removal the taxes should have been paid before removal, and it was only the tax thus due which was assessed. But if I am in error in this, section 3253 expressly provides that its terms "shall not exclude any other remedy or pro-

ceeding provided by law," and the remedy and proceedings in this record are clearly under sections 3184, 3185.

The conclusion I arrive at is that complainant has not acquired title to the lands sued for, or any interest in them, and as the bill seeks no equity save such as would grow out of an ownership legal or equitable of the lands and lots, or some interest therein, it must be dismissed. But as the assessment of taxes seems to have been valid, and as Alexander & Co. were at fault, as well as the revenue officers, in the matters which led to this litigation, I shall direct that all the costs in this litigation incurred or placed thereon by the defendants, be paid out of the estate of E. L. Allen, for which execution may issue.

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DREXEL and others v. BERNEY, Ex'r, etc.

(Circuit Court, S. D. New York. November 17, 1882.)

EQUITY—RESTRAINING ACTION AT LAW—DEFENSE AT LAW.

Where the facts disclosed by a bill in equity would avail as a defense to an action at law, which is sought to be restrained, and complainant is not entitled to a discovery, the bill is demurrable.

*Tracy, Olmstead & Tracy*, for complainants.

*Lord, Day & Lord*, for defendants.

WALLACE, C. J. The facts disclosed by the bill will avail the complainant as a defense at law to the action which is sought to be restrained by the bill. They do not show a defense of an equitable character distinctively. Even if formerly the complainant might have been entitled to a discovery, now that parties can be examined in the same manner as other witnesses, at the instance of the adverse party, there is no necessity for such relief. *Heater v. Erie R. Co.* 9 Blatchf. 316; *Markey v. Mut. Benefit L. Ins. Co.* 3 Law & Eq. Rep. (1st Cir.) 647. The jurisdiction of a court of equity in this regard rests upon the inability of the common-law courts to obtain or compel the testimony sought, and when it can be obtained by the process of the latter it is an abuse of the powers of chancery to interfere. *Brown v. Swan*, 10 Pet. 497.

The demurrer is allowed.



## YALE LOCK MANUF'G CO. v. COLVIN.

*(Circuit Court, D. Vermont. December 1, 1882.)*

## DOCKET FEE—COPY OF ANSWER.

Where there was no hearing and no decision of the court, no docket fee is provided by the statute; but copies of an answer required by the rules to be furnished are taxable.

## In Equity.

*Betts, Atterbury & Betts*, for plaintiff.

*Henry A. Harman*, for defendant.

WHEELER, D. J. This cause was discontinued by the orator with costs to the defendant. The clerk in taxing costs refused to tax a docket fee of \$20, and for the answer; and the defendant appeals from this taxation. The discontinuance was the voluntary act of the party. There was no hearing and decision of the court; therefore no docket fee is provided for by the statute. No costs for the answer itself are provided for, and none are taxable for it. The copies of an answer required by the rules to be furnished are taxable. The making the answer is an incident to the appearance, and no statute makes any allowance for it. The rule (equity rule 25) in regard to it is a limitation without anything to operate upon, as the statutes and rules now stand.

## PAINE v. CENTRAL VERMONT R. Co.

*(Circuit Court, D. Vermont. November 7, 1882.)*

## PROMISSORY NOTE—DEFENSES—PAROL TESTIMONY—SUIT BY INDORSEE—EQUITIES.

Defendant, a railroad corporation, executed a note, payable *on demand*, for money loaned by the payee, with the understanding that such note should stand against assessments on payee's subscription to the capital stock of defendant, and be delivered up when the stock was issued. Assessments large enough to cover the note were made. Afterwards, and three or four months after its date, the note was transferred to the plaintiff as security for a loan. The difference between the amount of the note and the assessments was paid in cash; and the stock was delivered after the plaintiff took the note. *Held*, that in a suit brought by the holder of such a note against defendant it was subject to all defenses that it would have been subject to in the hands of the original parties, as it must be considered as having been taken by the plaintiff after maturity, being payable on demand, under circumstances that should have put him upon inquiry, and that parol testimony was admissible to show the understanding between the original parties at the time the note was given

*Heman S. Royce and Eleazer R. Hard, for plaintiff.*

*Daniel Roberts, for defendant.*

WHEELER, D. J. The note on which this suit is brought was given for money lent, was payable on demand with interest, and was to stand against assessments on the subscription of the person to whom it was originally made payable to the defendant's capital stock. It came to the hands of the plaintiff between three and four months after it was made. Assessments on that subscription large enough to cover the note were made and stood against that person before the transfer of the note to the plaintiff; the balance of the assessments was paid by him, so that the amount due on the assessments exactly equaled the note at the time the plaintiff took it. The note was to be given up when the stock certificates should be delivered; but the note was in the hands of the plaintiff, and the certificates were delivered to the subscriber on his assurance that he would procure the note and give it up.

The evidence by which these facts as to the assessments were proved was objected to, and it is argued that it was not admissible to affect the note, and that without it there would be no defense to the note. There is no question but that parol evidence is inadmissible to alter, contradict, or vary a written instrument, in an action upon the instrument as claimed by the plaintiff, but that rule is not applicable to this proof. This evidence did not vary the note nor its obligation. It recognized the note as a valid instrument according to its terms, but showed an obligation from the holder to an equal amount to be set off against the note. There is no fair question but that the evidence is admissible if the facts established by it would affect the note in the hands of the plaintiff. At the time the plaintiff took the note it had not been demanded; and if it had been it would not have been honored but by making the offset, according to the understanding. The plaintiff took it for value as security for a loan actually advanced. If he cannot recover upon it he may lose some of the money lent; if he does recover upon it the defendant may lose the assessment. The question arises here as to which, under the law, should stand this risk of loss. The plaintiff took the title of the person he dealt with to the note, and acquired all the rights of that person upon the note. Those rights were to have the note set off against the assessments. If the plaintiff's rights are no greater than that he cannot recover. He has no greater rights, unless the defendant is bound to stand to the note as due in the hands of the plaintiff on account of his position in respect to it as induced by the act of the defendant

in leaving the note outstanding. If the act of the defendant in leaving it outstanding induced him to part with his money without fault, the defendant ought to make the note good to him, as it appeared to be; but if he was in fault in taking it he has no ground to hold the defendant to make it good to him. As the note was on demand, it was due presently. It would have to be presented and paid according to the usual course of business, if free from defenses. The time would come when, if outstanding, the presumption would be that it had been demanded, or that a demand had been omitted because known to be unavailing. If this time was such as to make it reasonable to suppose that the note was outstanding because it would not be paid, then the plaintiff was in fault in taking it without inquiring of the maker. Whether the lapse of time was such is a question of law. On this question the authorities are not uniform, but no case shows that more than three months can reasonably be overlooked. Business paper would usually be adjusted within that time, if regular. In this case the circumstance that the holder of the note was borrowing on disadvantageous terms, would lead directly to the inquiry why he did not resort to the maker of the note when it was due on demand. Had the plaintiff inquired, the presumption is that he would have learned the truth, and both would have been saved from loss. As he did not inquire, it seems more just, as well as lawful, that he should take the risk brought about by the failure to inquire, than that the defendant should.

It has been argued with much plausibility that there was nothing perfected to meet the note until the stock certificates were delivered, long after the plaintiff had it, and that, therefore, it was valid when the plaintiff took it. But this argument is not well founded in fact. The person who took the note was not a purchaser of stock, but a subscriber for stock. The assessments made the debt due from him, and it was that debt which met the note. He could not resist payment of assessments because the stock certificates were not delivered. The delivery of the certificates did not pay the note, nor create the debt which would pay it. That was merely the occasion when the note was to be delivered up. *Amer. Bank v. Jenness*, 2 Metc. 288. The president of the defendant held out encouragement to the plaintiff that the defendant would pay this note if the plaintiff did not succeed in collecting the debt to which it was collateral; and this fact has been relied upon by the plaintiff as a waiver of the defense now set up. There was no new consideration for any undertaking in this respect. It does not appear that the plaintiff lost anything by

reason of what took place on this subject. He has the same right against his debtor since that he had before, and the same rights against the defendant.

The plaintiff must stand upon his rights acquired by taking the note at the time and under the circumstances when he took it. The note was at that time overdue, and he took it with the same obligation that it carried in the hands of the person whom he took it of. This principle that overdue paper is taken subject to all defenses is so well settled in the law as to require no citation of authorities to support it.

Judgment for defendant.

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### LANGDON v. UNION MUTUAL LIFE INS. CO.

(Circuit Court, E. D. Michigan. June 5, 1882.)

#### 1. LIFE INSURANCE—FOR BENEFIT OF ANOTHER.

A person may insure his own life and make the policy payable to any one, though such payee has no interest in the life of the insured. Hence, where a policy was taken out upon the life of one, and made payable to another (who had no legal interest in it) *in case he survived the assured*, and there was strong evidence tending to show that the transaction was a mere wager, *held*, that it was properly left to the jury to say whether the policy was obtained in good faith, and not for the purpose of speculating in the hazard of a life in which the plaintiff had no interest.

#### 2. SAME—PRIOR APPLICATION.

An applicant for a policy was asked the following question: "Has any application ever been made either to this or any other company, upon which a policy was not issued?" *Held*, that a negative answer was not improper, although an application had been made which had not been finally passed upon by the company.

#### 3. SAME—MISTAKE OF AGENT.

Where an applicant made a full statement of all the facts regarding the name of his usual medical attendant to the subagent who took the application, and the subagent, putting his own construction upon the facts, filled in the wrong name, it was held the company could not take advantage of the mistake.

This was an action upon a policy of life insurance upon the life of Augustus E. Baker, "for the sole and separate use and benefit of his brother-in-law, William W. Langdon. But in case of his previous death to revert to the insured." The facts in relation to this policy were substantially as follows: The agent of the defendant solicited Langdon, the plaintiff, to insure his life in his company. This application plaintiff declined, but said to the agent that he might go to

his brother-in-law, Baker, and get him to make an application for a policy, and the plaintiff would pay the premiums. Baker was the plaintiff's brother-in-law, but he had no other interest in his life. The court left it to the jury to say whether the policy was taken out in good faith by Baker, with a designation of the plaintiff as a person to receive the money, or whether it was intended by the plaintiff as a wagering contract upon Baker's life. The jury returned a verdict for the amount of the policy.

Motion was made for a new trial upon the ground of misdirection upon this and other points stated in the opinion.

*Moore & Canfield*, for plaintiff.

*H. M. Duffield*, for defendant.

Brown, D. J. The policy in this case purported upon its face to be taken out by the insured upon his own life, but the evidence shows that it was taken at the suggestion of his brother-in-law, who sent the agent of the company to Baker, and paid all the premiums upon the policy. It was made payable to the plaintiff in case he survived Baker. Baker's life had previously been insured in other companies for plaintiff's benefit to the amount of \$6,000. He had also made application to the Massachusetts Mutual Life Insurance Company for a policy of \$3,000, which was rejected. Upon the trial, the question was left to the jury to say whether the policy was obtained in good faith, and not for the purpose of speculation in the hazard of a life in which the plaintiff had no legal interest. It was thought that the fact that the policy provided in express terms that in case of the previous death of the plaintiff it should revert to the insured, and hence that the plaintiff's interest was contingent upon his surviving Baker, was some evidence to go to the jury that the policy was taken out in good faith. It was certainly consistent with an understanding that the plaintiff wished to hold the policy during his life as security for the premiums, with a resulting trust in favor of Baker's wife, who was his own sister.

It is now well settled in the federal courts that a party cannot take out an insurance upon his own life and assign the policy, either contemporaneously with its execution or subsequently, to a person having no legal interest in his life, although the decisions of the state courts upon this point are conflicting. *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643.

But there is no case, to my knowledge, which holds that a party may not insure his own life and make the policy payable to any one

he may select, though such person have no legal interest in his life. This point was first held in the case of *Campbell v. New England Mut. Life Ins. Co.* 98 Mass. 381. The policy in this case was taken out by Campbell upon his life, payable to him, his executors, etc., for the benefit of the plaintiff, in very nearly the same terms as are contained in the policy under consideration. The only substantial difference in the two cases is that the premium in this case was paid by the assured, and not by the beneficiary. So in the *Provident Life Ins. Co. v. Baum*, 29 Ind. 236, it was said to be "beyond question that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money, in case of his death during the existence of such a policy." This was an accident policy in similar terms. Although this exact question has not often been decided, the intimations of the courts are uniformly in the same direction. *Lemon v. Phoenix Mut. Life Ins. Co.* 38 Conn. 294, 302; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; *American L. & H. Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Fairfield v. N. E. Mut. Life Ass'n*, 51 Vt. 624; *Olmstead v. Keyes*, 11 Ins. Law J. 55.

Hence, the production of the policy, proof of payment of premiums, and of the insured's death, were sufficient to make a *prima facie* case for the plaintiff without evidence of interest in him. The facts, however, that the policy was taken out by Baker at the plaintiff's instigation, and that the premiums were paid by plaintiff, taken in connection with Baker's position in life, his total want of means, and the further fact that the plaintiff had obtained policies upon his life to the amount of \$6,000 in addition to this, were strong evidence to show that the transaction was a mere wager upon his life, notwithstanding the fact of Baker's reversionary interest. The case was submitted to the jury in supposed conformity to the opinion of the supreme court in *Conn. Mutual Life Ins. Co. v. Shaffer*, 94 U. S. 67. See, also, *Ætna Life Ins. Co. v. France*, Id. 561; *Brockway v. Mut. Benefit Life Ins. Co.* 10 Ins. Law J. 763-769; *Wainwright v. Bland*, 1 Moody & R. 481; *Swick v. Home Life Ins. Co.* 2 Dill. 160. The mere payment of the premiums by plaintiff is not conclusive evidence that the policy was taken out by him. *Tuston v. Hardey*, 14 Beav. 232; *Armstrong v. Mut. Life Ins. Co.* 13 Reporter, 711. Were it an original question, I should be disposed to say that a policy taken out by one person for the benefit of another could no more be supported without evidence of legal interest in the beneficiary, than a policy

assigned to one having no interest in the life. But a large number of cases seem to make this distinction, and I know of none which reject it. Under all the circumstances, I think the question was properly submitted to the jury.

There was no error in the charge respecting the prior application made to the Massachusetts company. In the application in this case the following question was asked: "Has any application ever been made, either to this or any other company, upon which policy was not issued?" The answer was, "No." The evidence showed that upon the day before Baker made this application he signed a written application for a policy in the Massachusetts Mutual Life Insurance Company, and submitted to an examination by the surgeon of the company. This examination proving unsatisfactory, the surgeon certified upon the back of the application that the risk was an unfit one. The application was then returned to the general agent of the company, who forwarded it to the home office of the company in Springfield, Massachusetts, where it was rejected. If the question had been, "Has any application ever been made to this or any other company upon which a policy *has not been* issued," I should have had little difficulty in holding that the answer was false; but I think that there is a distinction between the words "was not" and "has not been" issued. I think a person of ordinary intelligence might answer no to the first form of the question, supposing that the company desired to know whether an application had been made and rejected. But the application in this case had not been rejected. The examining surgeon had no authority beyond his certificate as to the physical condition of the party examined. Notwithstanding this certificate, the company might have issued the policy if it had chosen to do so. It did not, in fact, reject the application until some time after the application in this case had been made to the defendant. The question as put was somewhat ambiguous, and I think it contemplates, when fairly and reasonably construed, that the company desired to know whether an application had been made and rejected. So long as the matter was still pending, it does not seem to me that a negative answer to the question was an improper one.

There was no error in the refusal of the defendant's request that Baker's statement of his age in the application was entitled to no greater weight than any other statement of his as to his age. The request asked for a charge upon the weight of testimony. Parties have no right to this. The court may, in its discretion, comment upon the testimony, and even express an opinion upon it, and upon the weight

to which the several items of testimony are entitled, but counsel have no legal right to such instructions.

Baker did misstate the name of his medical attendant, and upon the first trial this misstatement was held fatal to a recovery; but upon the last trial it appeared that he made a full and fair statement of the facts regarding his medical attendant to Mr. Hitchcock, the person who took his application, stating that Dr. Loring had been his medical attendant in Providence, and up to the time he removed to Detroit; that since he had been here Dr. Book had treated him for a disorder of the nose, and, being evidently in some doubt as to what the correct answer was to the question, he left it Hitchcock to make the answer. He, it seems, put his own construction upon his language, and advised him, under that state of facts, to answer that Dr. Loring was his medical attendant.

It is claimed by the defense that the company is not estopped by this statement, because Hitchcock was not the agent of the company, but a subagent holding his appointment from the general agent of the company, Mr. Patton. Had Hitchcock been the general agent of the company, there can be but little doubt that the case would have fallen within the decision in *Ins. Co. v. Wilkinson*, 13 Wall. 232. While it is true that Hitchcock did not hold his appointment from the company, but from Mr. Patton, the contract between Patton and the company, produced upon the motion for a new trial, shows that it was contemplated that Patton should appoint subagents, whose duty it would undoubtedly be to take applications. Besides, it is a well-known custom of insurance agents to employ subagents of this kind to take applications, which are forwarded by the general agent of the company and upon which policies are constantly issued. Under such circumstances it seems to me, upon principle as well as authority, that the company ought not to say that the construction put by a subagent upon a statement made by the insured as to his medical attendant (a statement made in entire good faith) was false. I do not contend but that if the statement was false in fact and designedly so, or if it was made with intent to impose upon or mislead the company, the mere knowledge of the subagent would prevent the company from taking advantage of it. But where, as in this case, the applicant states all the facts, and the subagent puts his own construction upon them, I think the company is estopped. *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 517; *Myers v. Mut. Life Ins. Co.* 3 Ins. Law J. 662; *Bodine v. Exch. Fire Ins. Co.* 51 N. Y. 117; *Van Schoick v. Niagara Ins. Co.* 68 N. Y. 434; *Strong v.*



*Stewart*, 9 Heisk. 137; *Furnas v. Frankman*, 6 Neb. 429; *Brown v. Ins. Co.* 45 Mo. 221; *Am. Ins. Co. v. Lesem*, 39 Ill. 314.

The motion for a new trial must be denied.

See *Brockway v. Mut. Ben. L. Ins. Co.* 9 FED. REP. 249.

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KING v. OHIO, ETC., R. CO.

(Circuit Court, D. Indiana. 1882.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.

A master is not relieved from responsibility in all cases when a servant is injured by the negligence of a fellow-servant, but only where the servants are engaged in the same common employment; that is, in the same department of duty, not in departments essentially foreign to each other.

2. SAME—LIABILITY FOR INJURY RESULTING FROM DEFECT IN CAR.

Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably-safe condition; and when an employe,—a brakeman, for instance,—in the proper discharge of his duty, is injured from a failure on the part of the company to perform this personal duty, it is liable.

*John A. Henny*, for petitioner.

*Harrison, Hines & Miller*, for receivers.

GRESHAM, D. J. The petitioner, Henry F. Bruning, by this proceeding seeks to recover damages for injuries sustained in coupling cars at North Vernon, Indiana, while in the service of the receiver. The petitioner and others, on the fifth day of January, 1880, were making up a freight train at this point to go south over the Louisville branch of the Ohio, etc., Railroad Company. He was assisting as brakeman in switching and coupling, and finally ran along with the train as it backed up to a coal car, and hurriedly stepped in between this car and the rear car of the train, when they were three or four feet apart, to make the coupling. Instead of meeting or bumping together, as they should have done, the draw-bars passed each other, and allowed the ends of the cars to come together, or so near together as to seriously injure the petitioner. The strip which supported the draw-bar of the coal car and held it up had become unbolted at one end, the nut being missing, and the draw-bar was thus allowed to drop far enough below its proper position to miss the draw-bar of the forward car and pass under it. There was some evidence tending to show that the "dead-wood," which is a block bolted on the end of the car, above the

draw-bar, to assist in keeping the cars from coming together, was imperfect, it being worn away as much as a few inches. If the coal car had not been out of repair the draw-bars would have met or bumped instead of passing, and the coupling would have been made without injury to the petitioner.

This coal car, which belonged to the company and had been in use for nine years, was, it appears from the evidence, brought from Washington, Indiana, loaded with coal, the evening or the night before the accident. The car inspector at Washington testified that he had inspected all cars on leaving that place the day before the accident, and none of them, so far as he observed, were out of repair. And three of the four car inspectors at Seymour testified that they had inspected all trains passing there from the west the same day and the night of that day, two performing the labor together during the day, and the third alone at night, and that the cars all seemed to be in proper condition.

There were no car inspectors at North Vernon at this time, but one appears to have been appointed for that place some months later. This appointment was made, however, it is claimed for the receiver, on account of the great increase of business at this point after the accident. There is no evidence that the coal car, or any other cars, were inspected at North Vernon. The petitioner testified that he did not notice the condition of the coal car until he ran in and took hold of the link to make the coupling, and that he did not discover his peril until it was too late to escape. He was caught between the ends of the cars when they came together, and seriously injured in his right side and chest. The physician who was called in after the accident, and who treated the petitioner for some time afterwards, testified that he found a depression of at least two inches on the right side, the ribs from the fifth down, on that side, being forced in that far; that he did not succeed by manipulation and bandaging in entirely removing this depression; that the right lung and the membrane surrounding it were seriously injured; that some months after the accident he thought, on examination, that he found an accumulation of pus in the lower part of the right lung, corresponding to the place of injury, and tubercular deposits in the top of this lung; that the petitioner was not able to work, and the chances were that he never would be.

During the year prior to the accident the petitioner had an attack of lung fever, from which he seemed to recover, and again went to work. He was a man of average health and strength, and there was

no evidence that he inherited any tendency to lung disease. Nine or ten weeks after receiving the injury he undertook to resume work on the road, but owing to his feeble condition he was compelled to rest at frequent intervals, sometimes for a week or longer. At the time his testimony was taken, which was two years or more after the accident, he was unable to work. It is not denied that his injuries were serious, very painful, and, perhaps, permanent.

It is urged for the receiver that the testimony failed to show want of proper care on his part, or that of his managing agents; that if any carelessness was shown it was the carelessness of the car inspectors, who should have discovered the damaged condition of the car before the accident, and ordered it into the shops for repairs; that the petitioner was compensated by his wages for his services, and all risks incident to his employment, including the carelessness of the car inspectors, who were his fellow-servants; and, finally, that the petitioner, by his own negligence, contributed to his injury by running in between the cars to make the coupling without using his eyes and discovering in time the dangerous condition of the coal car.

It is 100 miles from Washington, where the coal car was loaded, to North Vernon, and from Seymour to the same place the distance is only 15 miles.

It is not denied that the coal car was out of repair and unfit for use at the time of the accident, and in view of its then condition it is probable that the defects already described existed when the car passed Seymour, and even when it was loaded at Washington. These defects, when the car was detached, were plainly visible on examination, but when it was coupled up in a train and the draw-bar thus somewhat held in position, they were more liable to escape observation. But whatever the condition of this car may have been at Washington and Seymour, trains were made up at North Vernon, where the defective car was switched off on a side track to go south over the Louisville branch, and if proper care had been used at this point its damaged condition would have been discovered, and it would have been condemned for repairs instead of having been ordered into the train as it was.

It is not the law in the federal courts, nor is it believed to be the law in all of the state courts, that the master is relieved from responsibility in all cases in which a servant is injured by the negligence of a fellow-servant. The master's immunity is limited to cases where the servants are engaged in the same common employment; that is to say, in the same department of duty. Such immunity does

not extend to cases where the servants are engaged in departments essentially foreign to each other. A servant cannot be held to have contemplated, in the adjustment of his wages, those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties. *Hough v. Texas, etc., R. Co.* 100 U. S. 213; *Indianapolis, etc., R. Co. v. Morganstein*, 15 Chi. Leg. News. But, without further discussion of the question of the master's immunity, I prefer to rest the decision on other ground.

It is his duty to furnish his employes with proper machinery or instrumentalities for their use in the work assigned them, and to see to it that the same are kept in a reasonably-safe condition, or in reasonable repair. He may intrust this duty to others, but he cannot by so doing escape the responsibility for its negligent non-performance. The acts of his agents in this regard are his acts; their negligence is his negligence. This rule applies to individuals, and there is no good reason for exempting railroad and other corporations from its operation. It is true that corporations can act only by their agents, but that is no reason for not holding them to the same personal responsibility as natural persons. Conduct which amounts to personal negligence as against an individual should and does amount to the same thing against a corporation acting by its proper officers or agents. Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably-safe condition; and when an employe,—a brakeman, for instance,—in the proper discharge of his duty, is injured from a failure on the part of the company to perform this personal duty, it is liable. *Hough v. Texas, etc., R. Co. supra*; *Railroad Co. v. Fort*, 17 Wall. 557; *Dillon v. Union Pac. R. Co.* 3 Dill. 319; *Ford v. Railroad Co.* 110 Mass. 241; *Gibson v. Pac. R. Co.* 46 Mo. 163.

The master is bound to protect the servant, not against all risks, but against risks which could be avoided by the exercise of reasonable care on the part of the master. The brakeman's employment exposes him to constant peril under the most favorable conditions. He is expected and required to act with dispatch in coupling and uncoupling cars, and when he is negligently required by the proper officers or agents to handle cars out of repair, unfit for use and dangerous, and in doing so is injured, perhaps for life, without fault on his part, he should, in justice, have a remedy against his employer. This road and all its possessions were in the hands of a receiver, who was operating it at the time of the accident. He, of course, sus-

tained to the petitioner the relation of master, and the neglect of his proper agent or agents to condemn the coal car and keep it out of use until repaired was his neglect, for which he is liable.

It does not appear from the evidence that the petitioner knew the coal car was out of repair when he ran in, as he was accustomed to do, and as brakemen usually do, to make the coupling, or that, without stopping and looking before running in, he might have seen that it was unfit for use. He testified that he discovered for the first time when he was between the cars, and when it was too late to escape, that the draw-bars would not meet. Knowing that promptness in the discharge of his duties not only recommended him to his employer, but that it was required of him, the petitioner had a right to assume, without inspection, as he no doubt did, that the cars he was required to couple were in a proper state of repair for handling. It cannot be said from the evidence that the petitioner acted recklessly, or that he failed to use due care for his own preservation, and thus contributed to the injury. He earned \$45 a month at his business before the accident; he is now 31 years old, and he seems to have been industrious. His injuries were such that he is not expected to recover. It is fair to assume that he will never be able to perform active labor.

I allow him damages in the sum of \$4,000, including medicines, medical and board bills, and expenses of nursing.

See *McMahon v. Henning*, 3 FED. REP. 353; *Ross v. Chicago, M. & St. P. R. Co.* 8 FED. REP. 544; *Gravelle v. Minneapolis & St. L. R. Co.* 11 FED. REP. 569; *Miller v. Union Pac. R. Co.* 12 FED. REP. 600; *Dunmead v. Amer. M. & S. Co.* 12 FED. REP. 847.

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### BLYTHE v. LUNING.

(Circuit Court, D. California. March 13, 1882.)

#### TAXES—ON SECURITIES—DUTY OF CREDITOR TO PAY.

Under the constitution and statutes of the state of California it is the duty of the mortgagee to pay the tax assessed upon the value of the security held by him, and if he accepts the full amount due him upon the mortgage he cannot afterwards repudiate all liability for such tax, but must discharge the mortgage and all liens incident thereto, including the lien for taxes.

Demurrer to the Complaint.

*McAllister & Bergin*, for plaintiff.

*Sidney V. Smith, Jr.*, for defendant.

SAWYER, C. J. The constitution provides as follows:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. *The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof:* provided, that if any security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." Const. Cal. art. 13, § 4.

Under this provision of the constitution it was the duty of defendant to pay this tax. He was the party, and the only party, personally liable. It was his debt, and not the debt of plaintiff. The tax, however, is made a lien upon complainant's property as a means of securing its payment to the state. As it is a lien upon the land, the statute and constitution gives the mortgagor the right to pay the tax, as a means of relieving his land—a means of securing a speedy discharge of the lien—and allows him to deduct the amount so paid from the amount of his debt secured by the mortgage. But it is insisted that the right under the constitution is *strictissimi juris*; and that as the constitution only provides that, "if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof," he must pay the tax before he pays the debt, and, on the subsequent payment of the debt, deduct the amount before paid for taxes therefrom, but cannot pay the whole debt to a creditor who demands the whole, and repudiates any liability on his part to pay any part of the tax, and afterwards, when compelled to pay the tax in order to relieve the property from the lien, in addition to the whole debt, recover the amount from the party whose debt it is; that a payment under such circumstances is a voluntary payment of another's debt, which creates no liability. To adopt this view would be not only to regard the right as *strictissimi juris*, but also, in construing the constitution, to "stick in bark." *Qui hæret in litera, hæret in cortice.*

It can make no difference to the creditor whether the tax is paid first to the state and deducted from the debt, or the whole debt first paid to the creditor on his demand, and then refunded to the debtor, who is afterwards compelled to pay the tax to relieve his property from the lien; while for the debtor to first pay the tax to the state, and then enter into a legal controversy with a creditor who repudiates any liability, and the payment on his behalf, and refuses to receive the balance or discharge the lien, might greatly embarrass the debtor in the use or disposition of his property during the litigation, which may be protracted. When the mortgagor has paid to the mortgagee at maturity all the money which his contract requires, he is entitled to have the mortgaged property completely released from all liens and charges arising out of and incident to the mortgage; and he is entitled to have an immediate release from all such liens, in order that he may have the free and unobstructed use of his property. He has fully discharged all his liability to the mortgagee under the contract and the law, and he is entitled to have an immediate satisfaction and discharge of all liens and charges growing out of and incident to that contract, which the other party is required to give. The mortgagee, after receiving full satisfaction, cannot, for his own convenience, continue his lien for any portion of the demand against the consent of the mortgagor. It is true that, as security for the payment of the tax, he may require the mortgagor either to pay the tax himself, or to pay to him the amount, before releasing the mortgage. The right given to the mortgagor to pay the tax instead of paying the amount to the mortgagee is intended as a benefit to the mortgagor, and for his own protection, and not for the benefit or protection of the mortgagee. To adopt the construction insisted upon by the defendant would be to reverse this principle, and require him in many instances to stop and litigate his rights in advance, at the great hazard of losing his property by reason of his inability to make it available during the litigation. No such hazard was contemplated by the provisions of the constitution in question. In this case the mortgagee repudiated all liability to pay the tax, or any portion of it, levied on his secured loan; although the contract itself, as well as the constitution and law, so required. He accepted the full amount due him upon the contract by taking the money deposited for him under protest. It therefore becomes his duty to discharge the mortgage and all other liens incident to the contract. He had received the money from the mortgagor with which to pay the tax. As he declined to pay it, and the mortgagor was unable to use his property

by reason of the lien, which the mortgagee was bound to discharge, his payment was *in invitum*, and under *coercion*, or *quasi* legal duress, wrongfully imposed by the mortgagee, and in my judgment he is entitled to recover the amount so paid, with interest from the date of payment.

There is no impairing of the obligation of a contract in this case by these constitutional provisions. The new constitution had been adopted at the date of the mortgage, although but partially in force at the time. But, doubtless, the contract was made in anticipation of its going into effect, as it provided in express terms that the mortgagor should not pay the money in question, and by implication that the mortgagee should. The mortgagee was therefore bound to pay the tax under the contract, as well as under the constitution and statutes.

Let the demurrer be overruled, with leave to answer in the usual time and on the usual terms.

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### UNITED STATES *v.* BROOKLYN CITY & NEWTOWN R. R.\*

(Circuit Court, E. D. New York. November 13, 1882.)

1. INTERNAL REVENUE—FAILURE TO MAKE RETURNS OF INTEREST—PENALTY.

Where an action was brought against a corporation under section 120 of the act of June 30, 1864, as amended by the act of July 14, 1870, (16 St. p. 260, § 15,) to recover penalties for failure to make return of interest and pay the tax on a bond of the defendant, *held*, that only one penalty is recoverable for all failures to make the required returns prior to the commencement of the action to recover penalties for such failure.

2. SAME—FAILURE TO PAY TAX ON EARNINGS.

The same rule applies to penalties for failure to pay the tax on earnings and profits.

3. SAME—PLEADINGS.

To constitute a cause of action under section 120, the complaint is sufficient if it aver either a dividend declared, or the earning of profits, which instead of being divided have gone to increase the surplus fund of the corporation.

A. W. Tenney, for plaintiff.

Alexander & Green, for defendant.

BENEDICT, D. J. The decision of the questions raised by the demurrer in this action has been delayed by reason of the suggestion that a decision of the principal points involved, by the supreme court

\*Reported by R. D. & Wyllys Benedict.



of the United States, was about to be made. No such decision has yet been made, and as a determination of this case is now desired, I proceed to dispose of the demurrer. The amended complaint sets forth six separate causes of action. The first three causes of action are each a neglect to make return of interest and pay the tax on the interest due on a certain bond of the defendant. The first cause of action is the neglect and failure to make such return of the interest and pay the tax for the period from April to October, 1868. The second cause of action is a like failure for the period from October, 1868, to April, 1869; and the third cause of action is a like failure from April, 1869, to October, 1869. These counts are all founded upon section 120 of the act of June 30, 1864, as amended by the act of July 14, 1870, (16 St. at Large, p. 260, § 15.) and the only question raised in respect to them is whether the statute permits a separate penalty to be recovered for every failure to make return and pay the tax described, or whether the recovery must be limited to a single penalty for all failures prior to the commencement of the action. The language of the section upon which these counts are framed is the same in legal effect as that employed in section 122, which latter section was considered by BLATCHFORD, J., in *U. S. v. N. Y. Guaranty & Indemnity Co.* 8 Ben. 269, where it was held that the recovery must be limited to a single penalty for all failures prior to the commencement of the action. That ruling will be followed in this case, and accordingly it is held that upon the facts stated in the first three causes of action set forth in the complaint a single penalty and no more can be recovered.

The second three causes of action are alike, and consist of a neglect to make return and pay the tax on earnings and profits. In regard to these causes of action the ruling will be the same as that made in respect to the first three counts. Upon the facts stated in these counts no more than one penalty can be recovered.

An additional point is made in regard to the last three counts that the facts stated are insufficient to warrant any recovery. This objection is not well taken. To constitute a cause of action under this section the complaint is sufficient if it aver either a dividend declared or the earning of profits, which, instead of being divided, have gone to increase the surplus fund of the corporation. The complaint may, as I think, be considered to be sufficient within this rule.

Judgment for defendant on demurrer, with leave to amend.

## SIMPSON and others v. SCHELL.

*(Circuit Court, S. D. New York. November 17, 1882.)*

## RECOVERY OF DUTIES PAID BY THIRD PARTIES.

Where merchandise is withdrawn upon the written authorization of the importer, by third parties who pay the duties thereon, in an action by the importer against the collector of the port to recover duties illegally exacted, the duties thus paid may be recovered upon the assumption that they were paid in behalf of the importer.

*A. W. Griswold*, for plaintiff.

*S. L. Woodford*, for defendant.

WALLACE, C. J. The plaintiffs, upon the importation of merchandise, entered the same for warehouse and executed the usual bond. The merchandise was withdrawn upon the written authorization of the plaintiffs by third persons, the latter paying the duties. In a suit against the defendant as collector of the port, to recover duties illegally exacted, the referee allowed the plaintiffs the duties which were paid by the persons who withdrew the merchandise. Exceptions to the rulings of the referee having been filed, the question now is whether the plaintiffs can recover the duties thus paid.

The theory of the plaintiffs, which was adopted by the referee, is that the persons who withdrew the merchandise under the authorization of the plaintiffs were the plaintiffs' agents, and therefore the duties paid by them were in law paid by the plaintiffs. That the persons who were thus authorized to withdraw the merchandise were the agents of the plaintiffs, so far as to make the plaintiffs responsible for the act of withdrawal and any liabilities springing therefrom, to the same extent as though the plaintiffs had acted in person, is undoubtedly true; but it does not follow that the relation of principal and agent existed as between themselves. If the duties were paid for the plaintiffs, or if by the agreement between the parties the payment, though not made with their moneys, would ultimately fall upon the plaintiffs, then they would be regarded as the principals.

But the question here is simply as to the burden of proof. The case was argued as though the persons who withdrew the goods had purchased them from the plaintiffs and had agreed to pay the duties themselves; but the case does not disclose any evidence or offer to prove such a state of facts. As the plaintiffs were the owners of the merchandise, and the parties primarily responsible for the payment of the duties, it is a reasonable presumption of fact that the persons

who were authorized by them to withdraw the goods and pay the duties which were required to be paid upon withdrawal, were acting in their behalf in the whole transaction. The case is quite similar to *Greenleaf v. Schell*, 6 Blatchf. 227, where the verdict, the reference to ascertain the amount due, and the question raised before the referee were substantially the same as here.

The exceptions are overruled.

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*In re* MEAD, Bankrupt.

(District Court, S. D. New York. November 21, 1882.)

1. **BANKRUPTCY—EXPUNGEMENT OF DISPROVED CLAIM.**

Where, upon a long re-examination of a creditor's proof of debt, the claim, as made, is disproved in form and substance, it should be expunged.

2. **SAME—JOINT TRANSACTIONS—FILING NEW PROOFS.**

Where a large claim was proved upon six notes, alleged to have been given for loans of money and accumulated interest thereon, and on re-examination it appeared that none of the notes were given on a loan at interest, but that all the advances of money were made for the purposes of continuous speculation in city lots through many years upon joint account between the creditor and the bankrupt, and under his management; that large losses had eventually arisen, apparently sufficient to cover all the creditor's claims, and that no final account as to the result of all the joint transactions had ever been had: *held*, that the notes were not intended as unconditional promises of payment, but were subject to the final result of the joint transactions, and that the proof of them as absolute debts on loans at interest should be expunged, with liberty to the creditor to file new proof on the result of the joint transactions, if anything should be claimed to be due thereon, on payment of costs, and on filing a statement in detail of the account on which the claim should be made.

*Nelson Smith and C. A. Hart*, for contestants.

*Edward G. Black*, for claimant.

BROWN, D. J. The contesting creditor in this proceeding seeks to expunge a proof of debt made by the claimant James C. Mead, a cousin of the bankrupt, upon five promissory notes of the latter, dated in 1873, 1874, and 1875, to the amount of \$34,350. The adjudication of bankruptcy was made on June 29, 1878, in involuntary proceedings, upon the petition of six creditors, including the claimant, at the instance and request of the bankrupt or his attorneys. The regular business of the bankrupt was that of a plumber, but he had been largely engaged in speculation in city lots during 15 or 20 years prior to the adjudication; and in the year 1875, or prior thereto, he had become insolvent through the great depreciation in the value of

real estate during the few years previous. The claimant, in his original proof of debt, states that the notes were given for money "loaned and advanced by him to the bankrupt at or about the dates of the several notes," etc. By an additional affidavit which has been admitted as an amended statement of the consideration of the notes, they are alleged to have been given "for moneys loaned and advanced by the claimant to the bankrupt at or about the dates of said notes and of other notes surrendered, and the notes now proven or given, and interest on sums which had been loaned prior to the giving and receipt of said notes."

Though the grammatical construction of the amended statement may be dubious, the meaning is plain that the sole foundation of the claim is a simple loan of moneys to the bankrupt at various times, with the accumulations of interest thereon; and the notes are presented as unconditional obligations of the bankrupt to pay the amounts stated in them, as they import upon their face.

The examination of this claim, under section 5081 of the Revised Statutes, upon which a large mass of evidence has been taken, discloses transactions between the claimant and the bankrupt running back, perhaps, to 1860. But no books of account recording any of these transactions are produced, nor any vouchers in support of a single one of the alleged original loans. The claimant, moreover, was unable on his examination to specify the date or amount of any one of all his alleged advances of money; but he estimated that the total amount advanced by him to the bankrupt was from \$10,000 to \$12,000, the rest of the claim being profits.

These advances are repeatedly spoken of in the testimony as loans upon interest. But the examination shows by a great preponderance of testimony, both of the claimant and of the bankrupt, that all the moneys advanced by the claimant were advanced for the purposes of continuous speculations in city lots, on the joint account of the claimant and the bankrupt, and of others who might advance him money for the same purposes; the purchases and sales to be made by or under the management of the bankrupt, and the profits to be divided, *pro rata*, according to the money of each employed in the purchases. Up to about 1872 these speculations seem to have been largely profitable. Many such purchases and sales on joint account were made and large profits thereon were reported by the bankrupt to the claimant. No accounting in detail was ever had between the parties as to any of the purchases and sales. The claimant took, without question, such statements of the results as the bankrupt from time to

time made to him. On January 1, 1875, the claimant's interest in the joint operations had amounted, according to an entry made by the bankrupt in his pocket diary of that date, "in an accounting with James C. Mead," to "\$18,970 in cash due him, not invested, and \$21,380 invested into lots."

The claimant testified explicitly that none of the moneys advanced, or of the profits thereon from time to time, were ever withdrawn by him; but that, as often as any lots were sold, both the principal invested in them and his share of the profits were left in the hands of the bankrupt for further similar speculative purchases, and that the bankrupt had full authority from him to employ all such moneys and profits in that way, and that this understanding between them continued *down to the last*.

From some portions of the testimony it would appear that notes were sometimes given on the original advance of the money; from other portions that notes would be taken when profits were ascertained or declared upon some sale of lots, the former notes being surrendered and new ones substituted, including the profits. But from the explicit testimony of the claimant that it was the understanding that all such advances and profits remained in the bankrupt's hands for further speculation on joint account down to the last, and from the fact that they were so used or held by the bankrupt, it is manifest that such notes could not have been either given or received, or intended by either party, as unconditional obligations to pay the sums named in them. They were necessarily subject to the result of the speculations in which the parties were jointly engaged, and they were probably designed as no more than memorandums or vouchers of the estimated amount in round numbers (for they do not accord in dates or in amounts with any of the entries in the bankrupt's private dairy) of the contributions of the claimant, from time to time, to the joint operations in charge of the bankrupt. Upon notes given for such a purpose, or on such an understanding, the facts being proved or admitted, no judgment could be recovered while the joint transactions remained open and unsettled, as in this case.

The basis of the claim, as stated both in the original and in the amended proof of debt, is therefore shown to be erroneous. The notes do not represent any loan of money upon interest; nor was there ever any unconditional obligation of the bankrupt to pay the amount of the notes, as they import on their face, or any part of

them. A loan on interest, with a further stipulation for a share of any profits which the bankrupt might make by the use of the moneys on his own account, would have been usurious. But it is very clear, upon all the evidence, that these were not such loans at all. The moneys advanced remained in the bankrupt's hands, the proper moneys of the claimant, for use in speculation on joint account; the claimant's share of the profits, when collected, were the claimant's proper funds; and both were subject to deduction for his share of any losses that might arise, and at the close of all the transactions on joint account, any moneys in the bankrupt's hands and any claim against him for previous receipt of such moneys, were subject to be offset by whatever losses in any of the joint transactions were justly apportionable to the claimant's share.

At the date of the "accounting" above referred to, viz., January 1, 1875, 11 lots, purchased about 1872, in which \$21,380 of the claimant's funds are said to have been invested, were still unsold. They had greatly depreciated in value since the purchase, and large loss upon them beyond the money invested in the purchase, was then obvious. They were shortly afterwards, during the year 1875, disposed of, either at private sale or by foreclosure, and at such a loss upon the claimant's share therein as would appear, from the evidence put in by the contestant, to exceed the amount of the notes proved and the entire credit given to the claimant by the bankrupt in his entry of January 1, 1875.

The claimant's share of the loss in these lots would be an offset even against any claim upon the bankrupt on loans independent of the joint transactions; and this offset, as I have said, seems, from the evidence, to be equal to the entire claim presented, unless the claimant's share in the 11 lots referred to was subsequently materially diminished. It is contended by the claimant that it was so diminished in January and February, 1875, to the extent of \$13,000, upon an agreement to that effect made in January and February, 1875, at the time when the notes of \$6,000 and \$8,000 were given, and that these two notes were given as absolute obligations. But I am not satisfied from the evidence that any such change in the relative obligations of the parties, or any such reduction in the claimant's share of the losses justly chargeable against him, is made out, either in law or upon the facts.

As above stated, in January and February, 1875, when the agreement for the partial withdrawal of the claimant's interest in the lots is alleged to have been made, large losses beyond the money invested

in the lots then held on joint account had obviously been incurred. The claimant had then no interest in them, of any pecuniary value, which he could convey or transfer to the bankrupt, but only a large loss which he was legally bound to share with him *pro rata*. Accordingly, no transfer or sale of his interest to the bankrupt is spoken of in the testimony; but only a withdrawal of so much from the lots. But, in fact, the claimant then had no moneys in those lots which could be withdrawn; all that had been invested in them on his account had been plainly lost, and far more; and I cannot doubt that both parties knew this fact. Upon the testimony, the note of \$8,000 appears to be nothing but a voluntary concession to the claimant's complaints, without any legal demand upon the bankrupt for any valuable interest in the lots. Any new agreement, however, whereby the bankrupt's share of the losses already incurred was to be materially increased, could only be sustained upon some sufficient legal consideration.

The only consideration alleged is in connection with the note of February, 1875, and the alleged "withdrawal" of \$5,000 at that time, viz., in the advance of \$1,000, by the claimant to the bankrupt, to enable him to rescind a contract of sale of his house on Fifty-third street, and to pay back the cash received on the contract of sale; and the bankrupt testifies that the giving of the note of February, 1875, and the "withdrawal," were "on the same day" as the advance of the \$1,000, "or on the next day." But the testimony subsequently taken shows incontestably that this repayment was in September, 1874, some four or five months before the time of the alleged partial withdrawal of the claimant's interest in the lots, and before the giving of either of the two notes referred to; so that if the partial "withdrawal" of the claimant's interest was in January and February, 1875, as alleged, it was without any proved legal consideration; nor can it be supposed that the bankrupt would be willing to assume a greatly-increased share of the loss without any consideration whatever. But if he were willing, a mere promise to do so, and a note given for no other consideration, would not be legally binding.

On the other hand, if the time of the "withdrawal" be supposed to have been erroneously stated as in January and February, 1875, instead of September, 1874, then the evidence fails to connect the notes of January and February, 1875, with any such withdrawal four or five months previous; and the bankrupt's entry on January 1, 1875, of the result of "the accounting with James C. Mead" on that date, must be held to include and to allow for any such "withdrawal"

or change of interest made in the September previous; and the claimant's share of the losses would then remain undiminished, as shown by the contestant.

Moreover, the testimony in relation to the alleged "withdrawal" refers only to an interest in the particular lots then unsold, and does not show any change whatever in the conditions or purposes for which the money deemed withdrawn from the lots was still left in charge of the bankrupt. The claimant says expressly that the same arrangement continued down to the last; so that the notes of January and February, 1875, if given on the withdrawal, as claimed, would not differ in character from the previous ones, but would be legally subject to the result of the final accounting as to all the joint transactions.

Holding upon the evidence, therefore, that none of the notes in question were given upon any loan of money on interest, or intended as absolute or unconditional promises to pay the amounts mentioned in them, but that they were at most merely vouchers for the estimated amount of the claimant's moneys in charge of the bankrupt for the purposes of speculation in lots on joint account, and therefore at all times subject to the final result of all the joint transactions; that this original understanding of the parties continued unchanged "down to the last;" and that large losses ultimately arose in the joint transactions, a part of which is chargeable against the claimant, and no final account in relation thereto having ever been had between the bankrupt and the claimant,—I must hold that the proof of debt as filed is not made out, either in form or in substance, and that it must therefore be expunged. Whether anything is owing to the claimant, either upon the notes, or for his advances and profits, depends wholly upon the result of the final purchases and sales on joint account; and this has never been ascertained, either by any attempted settlement between the parties, or by any accounting in court. The evidence given in this proceeding by the contestant in relation thereto was incidental only, and not upon a direct issue on that subject.

Although the evidence, therefore, shows losses sufficient to cover all the claimant's demands, it should not, I think, be held to preclude further examination on that subject, if on a just accounting as to all the joint transactions, anything is claimed to be due.

An order should, therefore, be entered expunging the proof of debt as made, but without prejudice to the claimant, or his representative, filing new proof of debt for any balance claimed upon joint



transactions in real estate, or upon an account stated as the result of all their joint dealings; but such new proof should not be allowed except upon payment by the claimant of the costs already incurred in this proceeding, nor except upon a statement in detail of the account of the joint transactions since the last actual settlement between the parties, upon which any balance may be claimed; and in any proceedings for the re-examination of such new proof of debt, if made, the testimony already taken, or any part thereof, may be used by either party.

### DUMONT and others v. FRY, Trustee, etc., and others.

(Circuit Court, S. D. New York. November, 1882.)

#### 1. BANKRUPTCY—SURETY GUARANTYING ANY UNPAID BALANCE—APPROPRIATION OF DIVIDEND.

C. & Son hypothecated certain bonds to S. & Sons upon agreement that the bonds to the extent of \$100,000 should be held by the latter as a continuing security for *any overdraft or unpaid balance* that might arise upon the account of the New Orleans National Banking Association with S. & Sons. The New Orleans National Banking Association and S. & Sons having gone into bankruptcy, the claim of S. & Sons against said association, amounting to \$195,315.13, was proved, and a dividend of 55 per cent. thereon paid to their trustee. *Held*, that the whole of this dividend should be applied to discharge the unsecured portion of the claim of S. & Sons against the banking association, and not ratably upon that part secured by the collaterals as well as upon that part unsecured.

#### 2. SAME—GUARANTY OF PART OF DEBT.

Where a surety guaranties a limited part of a debt and not the unpaid balance of a debt, with a limitation as to the amount of the liability in case of insolvency, whatever is paid as a dividend arising from that part of the debt must be applied to discharge that portion; but when the guaranty contemplates the protection of the creditor against *any* ultimate balance that may arise upon the dealings between the debtor and the creditor, this rule does not apply.

*E. A. Hutchins*, for complainants.

*Platt & Bowers* and *Man & Parsons*, for defendants.

WALLACE, C. J. The question now raised upon the settlement of the decree was not suggested at the hearing of the cause or upon the briefs of counsel, doubtless upon the assumption that there would be no controversy in regard to it, the principal contention being disposed of. It was decided that the hypothecation of the collaterals made by Cavaroc & Son to Schuchardt & Sons was upon the agreement that the bonds, to the extent of \$100,000, should be held by the latter as a continuing security for any overdraft or unpaid balance that might arise upon the account of the New Orleans National Banking Associa-

tion with Schuchardt & Sons. The bonds were held by Schuchardt & Sons pursuant to the terms of the hypothecation until the suspension of the banking association, when the latter went into liquidation. As was subsequently ascertained, the unpaid balance of the account due from the banking association to Schuchardt & Sons was the sum (adding interest) of \$195,315.63. The comptroller of the currency, pursuant to the provisions of the laws of congress respecting national banking associations, proceeded to appoint a receiver of the New Orleans National Banking Association, and to wind up its affairs. By section 5236, Rev. St., the comptroller is required to make a ratable dividend of the moneys arising from the assets of such associations upon all claims proved to his satisfaction. Fry, as trustee in bankruptcy of Schuchardt & Sons, proved their debt of \$195,315.63 against the banking association to the satisfaction of the comptroller. The comptroller thereafter declared a dividend of 55 per cent. to the creditors of the banking association, and paid Fry such a dividend upon the claim proved by him. The question now is whether Fry can apply the whole payment thus received, first, to discharge the unsecured portion of the claim of Schuchardt & Sons against the banking association, or whether he must apply it ratably upon that part secured by the collaterals as well as upon the part unsecured.

Obviously this is not the ordinary case when a creditor holding two demands against his debtor, one of which is secured and the other is not, may exercise his right to appropriate a payment in the absence of any application made by the debtor at the time. Nor is it the case where, neither party having made application of a voluntary payment, it devolves upon the court to make the just and equitable appropriation. The payment here was not made by the debtor, and the case, therefore, is not controlled by the rules ordinarily governing the appropriation of payments made to creditors by debtors. The payment here was made by the law—the statutes of congress which vested the comptroller of the currency with authority to distribute the assets of the banking association, and which prescribed the mode of distribution. Neither the debtor nor the creditor could exercise the right to determine the application of the dividends. If the case turned merely upon the law of the appropriation of payment, it would not be a doubtful one. The general rule is that where the payment is not a voluntary one, but is made under legal proceedings, it is to be appropriated to all the demands against the debtor ratably, (*Blackstone v. Hill*, 10 Pick. 129; *Com. Bank v. Cunningham*, 24 Pick. 270;) and it would seem clear that as each dollar of the demand

earned its ratable proportion of the sum realized from the assets of the debtor, the sum earned by one portion of the demand could not be credited to the other, but should be applied ratably upon each dollar of the demand, whether secured or unsecured.

But the question here depends, not upon the law of the appropriation of payments, but upon the effect of the agreement between the sureties and the creditors. If Cavaroc & Son had become sureties for \$100,000 of any advance that Schuchardt & Sons should make to the New Orleans National Banking Association, and the Schuchardts had advanced \$200,000, it would be plain, upon authority, that the dividend earned by the whole advance should be applied ratably. As between the surety and the creditor that would be a case where the latter held two distinct demands, and a dividend arising from one of them could not be applied to the other without diverting it from its proper fund. But here the Cavarocs agreed with the Schuchardts that the latter might advance any sum they might see fit to the New Orleans National Banking Association, and that the Cavarocs' bonds, to the extent of \$100,000, should be security for any unpaid balance of the advances. The law can make no application of the payments received on account of the advances contrary to the agreement between the parties; and, as it was agreed that the Cavarocs should be sureties to the extent of \$100,000 for any unpaid balance arising between the primary parties, the general doctrines of the appropriation of payments cannot be invoked to defeat the agreement. A careful reading of the English authorities supports this conclusion. The result is determined by the character of the undertaking of the surety in each case. *Ex parte Hope*, 3 Montagu, D. & D. 720; *Midland Banking Co. v. Chambers*, 38 Law J. Ch. 478.

As is held in *Ellis v. Emmanuel*, 1 L. R. Exch. Div. 157, "it is a question of construction on which the court is to say whether the intention was to guaranty the whole debt, with a limitation on the liability of the surety, or to guaranty a part of the debt only."

In *Hobson v. Bass*, 6 L. R. Ch. App. 792, the undertaking of the surety was construed as though it read: "I guaranty the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250."

In *Ex parte Rushforth*, 10 Ves. Jr. 409, the same interpretation, substantially, was placed on the undertaking of the surety.

In *Paley v. Field*, 12 Ves. Jr. 434, the engagement of the surety recited the intention of the parties to be that the bankers should not be indemnified by the surety for any loss which they should sustain

by giving credit to the principal debtor beyond the sum of £1,500. The master of the rolls says: "The instrument marks distinctly that the sum for which the surety was to be answerable was as against him to be considered as the whole amount of the creditor's demand." *Bardwell v. Lydall*, 5 Moore & P. 327, is decided on the authority of *Paley v. Field*, but upon the facts cannot be reconciled with it, the guaranty being to secure a running balance of account.

In *Raikes v. Todd*, 8 Adol. & E. 846, and in *Thornton v. McKewan*, 1 Hem. & M. 525, the guarantee was to hold the plaintiff harmless for advancing a specified sum to the debtor from time to time, as he might require.

In *Gee v. Pack*, 33 Law J. (N. S.) 49, a note was pledged as security to repay an advance of £300 "now or hereafter to be made" on a banking account with a third person. COBURN, C. J., holds that the "document amounts to a promise to be liable for an advance to the extent of £300," and "not a general promise to pay £300 on any balance, however arrived at, or that may remain due on a general advance to the principal."

In all these cases an advance was made in excess of the sum guaranteed, and upon the debtors becoming insolvent the creditor received a dividend on the whole advance, and it was held that the dividend was to be applied ratably on the secured and unsecured portion of the whole demand. They all proceed upon the distinction that the surety had guaranteed a limited part of a debt, and not the unpaid balance of a debt, with a limitation as to the amount of liability,—a distinction which seems subtle, but which rests on the supposed intention of the parties. In a guaranty of a limited part of a debt the parties to it do not contemplate, as between themselves, any augmentation of the debt. Whatever is paid, therefore, as a dividend arising from that part of the debt must be applied to discharge that portion. As between the surety and creditor it is as though no other debt were held by the creditor against the debtor.

To apply the same rule when the guaranty contemplates the protection of the creditor against any ultimate balance that may arise upon the dealings between the debtor and creditor, would be to ignore the intention of the parties to the guaranty.

The conclusion is therefore reached that the bonds of the Caverocs, having been pledged to secure any unpaid balance arising upon the account of the New Orleans National Banking Association to Schuchardt & Sons, it is quite immaterial to the former how, when, or by whom part of that balance has been paid, so long as \$100,000 re-

mains unpaid. If, however, the dividends reduce the balance below the amount of the pledge, the sureties are to have the benefit of the reduction, because upon payment of the debt they would be subrogated to the creditor's lien upon the bonds.

See S. C. 12 FED. REP. 21; 13 FED. REP. 423

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INGALLS v. TICE.

(Circuit Court, S. D. New York. May 2, 1882.)

PATENTS FOR INVENTIONS.

Where the patentee entered into an agreement whereby he granted to complainants the sole right to sell the patented articles within certain specified territory, it does not grant any part of the legal estate in the patent. The right of the patentee, not only to make and use, but to authorize others to make and use, the articles within the specified territory, remains intact.

*F. H. Angier*, for plaintiff.

*Kuntzman & Yeaman*, for defendant.

WALLACE, C. J. The demurrer must be sustained on the ground that the bill does not show the complainants to have such an interest in the patent as is necessary to enable them to maintain suit for an infringement. The allegation of the bill in this behalf is that the patentee, for a valuable consideration, entered into a written agreement with the complainants "whereby the patentee granted unto said complainants the sole and exclusive right to sell said patented articles" within certain specified territory. The written agreement is not set forth. Its legal effect cannot be extended by inference beyond the fair purport of its terms as alleged. It does not purport to transfer to the complainants the right to manufacture the patented articles in the territory described, or the sole right to use the article in that territory. Not being a transfer of an undivided part of a whole patent, or of the exclusive right to the whole patent, for a particular territory, it is simply a license. *Gayler v. Wilder*, 10 How. 477. It is a grant or permission for a limited use of the invention within certain territorial limits. The complainants did not acquire any part of the legal estate in the patent. They could not authorize others to make the patented articles. The right of the patentee, not only to make and use, but to authorize others to make and use, the articles within the specified territory, remains intact. As the patentee is not a party to the suit, the complainants cannot maintain their bill.

Demurrer sustained.

## THE AUSTRIA. (Two Cases.)

(District Court, D. California. January 31, 1882.)

## 1. ADMIRALTY—INJURY AT PIER—INEVITABLE ACCIDENT.

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using proper precautions against danger, and an accident occurs. It is enough that the caution exercised should be reasonable under the circumstances; such as is usual in similar cases, and which has been found sufficient, by long experience, to answer the end in view—the safety of life and property. The highest degree of caution that can be used is not required.

## 2. SAME—CASE STATED.

Where a vessel,—made fast to a wharf by a competent band of stevedores by fasts which, through long experience, are deemed by them sufficient,—through the action of the winds and waves, breaks her fastenings and drifts towards a schooner, placing the schooner in such imminent peril that in moving to a place of safety she is capsized and founders, it is a case of inevitable accident.

*M. Andros*, for libelants.

*W. H. L. Barnes*, for claimants.

HOFFMAN, D. J. On the eighth of March, 1881, the ship *Austria* and the scow-schooner *Modoc* were lying at a pier on the north side of a slip in Oakland Long Wharf. The *Modoc* arrived at about 12 or 1 o'clock, and made fast to the wharf astern of the *Austria*—the latter being further up the wharf, towards its head. At about 4 o'clock P. M. the *Modoc* moved further up the slip to a position south and abreast of the *Austria*, with the object of getting under her lee, as the weather had become threatening. She put out several lines to the wharf forward and astern of the *Austria*, and attached one to the latter vessel about amidships. The wind continued, as night came on, to increase in violence, and at about 8 o'clock the *Modoc* was hailed from the *Austria* to let go the line attached to that vessel. Before, however, this could be done, the line was cast off by the *Austria's* crew. The *Modoc* then hauled off to the south side of the slip to a position to the south of and not far from abreast of the *Austria*.

A short time afterwards the schooner was hailed from the *Austria* to get away, as the latter was drifting. She had in fact parted her forward fasts, and her bow was beginning to swing round towards the south before the northerly gale. There seemed to be imminent danger that the schooner would be crushed between the *Austria* and the wharf. She therefore commenced hauling out between the *Austria's* stern and the stern of the *Transit*, a large steamer which was attached to the southerly pier of the slip. In so doing her boat was crushed, but whether by contact with the *Austria*, or by the falling

of the schooner's main boom, the topping-lift of which had fouled with the rigging of the *Transit*, is disputed. The *Modoc* continued to haul over towards the southerly pier, which she finally reached, but foundered almost immediately on coming in contact with it. The *Austria's* bows, in the mean time, had continued to swing around until they were checked by her bowsprit coming in contact with the railroad company's sheds on the southerly pier. As her stern lines still held, this brought her up, and she remained in the same position during the rest of the night.

It is claimed by the libelants that the accident was the indirect but not remote consequence of the *Austria's* negligence in breaking adrift.

1. The claimants contend that the breaking adrift was the result of inevitable accident; and,

2. That even if the *Austria* was guilty of negligence, the foundering of the schooner was the direct consequence of her being overladen and unseaworthy; that her deck-load had become saturated with water, rendering her crank and top-heavy, and giving her a list to starboard, which constantly increased until she capsized in the heavy sea which was setting in under the piles of the wharf; and that, as there was no actual collision of the vessels, the foundering of the *Modoc* was too remote a consequence of any negligence of which the *Austria* might have been guilty, to render her liable.

The circumstances of this case suggest several interesting questions, which, however, in the view I take of it, do not require a definitive solution.

In general, it would seem that where a vessel, herself free from fault, has been obliged by the fault of another to change her position, or attempt any other maneuver, to avoid impending danger, and in doing so sustains an injury, the damage should be deemed to have been caused by the vessel by whose fault she was compelled to incur the risks of making the maneuver. But in this, as in cases of apprehended collision, she is bound to exercise reasonable judgment and skill, in the absence of which the damages will be apportioned. 7 Wall. 203. But suppose the new position which she is obliged to take is more perilous than her original one, and that before she can move to a safer position a storm arises, the consequences of which she would have escaped in her old position. Is the offending vessel, which originally compelled her to shift her position, liable for the damage done by the storm?

Again: A vessel threatened with injury through the fault of another is, as already remarked, bound to exercise reasonable skill and

diligence to avoid or mitigate its consequences. Is she not also bound to be well conditioned and appointed, with all necessary appliances to avoid a collision, even though the danger of its occurrence may have arisen from the fault of another?

Suppose, for example, that in attempting to escape from an impending collision, a vessel, by reason of defective steering apparatus or rigging, sustains damage which she would have escaped had she been sufficiently provided. Or suppose that, being compelled to slip her anchor, she might readily have secured her safety had she been provided with proper lines and hawsers, but owing to the entire absence of these she is stranded. Or suppose that she is overladen and unmanageable, and from that cause unable to execute a maneuver which she might otherwise have safely accomplished.

It would seem, in these and similar cases, that where a vessel is endangered by the fault of another, and unable to secure her safety through the want of the usual and proper appliances and means, she is herself as much in fault as if her inability arose from the want of proper skill and diligence on the part of her officers and crew.

But if her inability has been the result of a peril of the sea or *vis major*, the consequences of which she has been unable to remedy, then her defective means should not be imputed to her as a fault.

It is unnecessary to pursue this subject further. Perhaps what has already been said is superfluous, as it is certainly *obiter*. In my judgment, the accident in this case is not to be attributed to the negligence of the Austria, but to "inevitable accident." Numerous authorities, defining the meaning of this term and illustrating its application, have been cited at the bar.

It will be sufficient to quote the language of the supreme court in a single case. "Inevitable accident," says the court, "is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. *The highest degree of caution that can be used, is not required. It is enough that it is reasonable under the circumstances; such as is usual in similar cases, and has been found, by long experience, to be sufficient to answer the end in view—the safety of life and property.*" *The Grace Girdler*, 7 Wall. 203.

The Austria was made fast to the wharf by a gang of stevedores, under the direction of Capt. Batchelder, a master stevedore of 30 years' standing, assisted by two foremen of great experience. It is unnecessary to enumerate the various chains and hawsers by which she was attached to the wharf. In the judgment of all concerned in



the operation, they were sufficient to secure her safety under all circumstances likely or possible to occur. Two witnesses, and those of no very great experience, suggest that it would have been better to put out her anchor chain. But this criticism is made after the event, and one of them, when informed what fasts were actually put out, admitted that "he thought them sufficient, except in *some great emergency.*"

Capt. Batchelder declares that even with his experience of the result, he would not moor the vessel differently if the work had to be done over again. He expresses the opinion that if he had put out the anchor chain, it would either have parted or torn out the pile to which it was attached. If the mooring had been insufficient, it would have been easy to establish the fact by the testimony of experts. No stevedore of experience has been called to express such an opinion.

I think, therefore, that the measures adopted by the Austria were, in the language of the supreme court, "reasonable under the circumstances; such as are usual in similar cases, and have been found, by long experience, to be sufficient to answer the end in view

It is contended on the part of the libelants that the Austria was negligent in not putting out other fasts after the first one had parted. The interval that occurred between the time when her fasts began to part and her bringing up against the shed was from 20 to 25 minutes. No expert has been called to state what the persons on board (three in number) could have done, more than they actually did, to prevent the vessel from breaking adrift. They were certainly busy paying out chain, etc., and doing what seemed best to them for the safety of the ship. It is not shown that three men were not the usual and proper crew or watch for a vessel lying in a slip and supposed to be securely fastened to a wharf.

But the conclusive answer to the suggestion is that the negligence suggested did not and could not have had any effect to avert the disaster.

The schooner was warned to move away when the danger of the ship's breaking adrift became apparent. The latter was in fact brought up by the sheds on the opposite wharf without touching the schooner, though possibly she may have crushed the boat at her stern.

The accident occurred during the attempt of the schooner to get out of the way of the vessel, which she was warned was drifting down on her. That attempt she made as soon as she was apprised of her danger. If, then, the men on board the ship had succeeded in preventing her bows from breaking adrift, the result would have been in

no respect different. She did bring up against the shed, without touching the schooner.

The latter foundered in the attempt to extricate herself from a position of imminent danger. That attempt she had already entered upon, and the result would have been the same if additional fasts sufficient to secure the ship had been put out, and her further drifting thereby arrested, just as it was a very short time afterwards by her coming in contact with the sheds.

The negligence, if any, to be imputed to the Austria, is negligence in the original mooring; and of this, for the reasons assigned, I do not find her guilty.

Libels dismissed.

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### THE FRITHEOFF.

(District Court, D. California. February 8, 1881.)

#### SEAMEN'S WAGES—PAYMENTS TO BE AFFIRMATIVELY ESTABLISHED.

Where the seaman shows himself entitled to a certain amount of wages, it is for the master to show payment in whole or in part; and where the testimony is conflicting and equally balanced on the question of payments claimed by the master to have been made, but of which there is no corroborative evidence, and nothing to justify rejecting the seaman's evidence, the case must be decided against the party on whom rests the burden of proof and duty of making out his case affirmatively.

*Daniel T. Sullivan*, for libellant.

*A. P. Van Duzer*, for claimant.

HOFFMAN, D. J. There is no dispute as to the amount of wages earned by the libellant on the two voyages, viz., \$134.94. The captain claims to have paid him on account various sums, the greater part of which the steward admits. The master took no receipts, and kept no accounts. He fails to produce a single written memorandum of any payment whatever. The man having shown himself entitled to a certain sum, it is for the master to show payment in whole or in part. The testimony being conflicting, and there being no circumstances developed which justify me in rejecting the steward's evidence, I must decide the matter against the party upon whom rests the burden of proof and the duty of making out his case affirmatively. The man admits having received \$32. He charges the captain \$1.50 for a pig supplied him. This does not appear to be disputed. I think, too, the evidence shows pretty clearly that two dol-

lars should be charged to him for time lost, and one dollar for a boat, making in all \$32.50 to be deducted from gross earnings. If the master is not allowed all the credits for payments on account to which he is entitled, he has only himself to blame for the loose manner in which he conducted his business. It seems incredible that a person owning several vessels, and commanding one, should have failed to obtain receipts or make any writing whatever showing the numerous payments he claims to have made. The master also claims an offset against the steward on account of the balance of a lot of cigars given or sold to the steward a year and a half ago, at the beginning of a former voyage. It is not quite clear from the captain's statement what the transaction was,—whether a sale to the steward, with the right on the part of the latter to return as many of the cigars as he should be unable to dispose of, or a bailment to him to sell them on the master's account. The steward denies the whole matter, and insists that he never bought or had anything to do with the cigars. There is no written memorandum of any kind of the transaction, nor any corroborative proof. I must apply the same rule to this claim as to the payments on account. The case is even stronger; for this demand is claimed to have arisen at the beginning or in the course of a voyage long since ended, and for which full settlement was made and the man paid by a draft on this city. Two voyages have since been made by the libellant in the same vessel, and it is to his claim for wages on these that the demand in question is set up as an offset.

It is evidently a stale and, I think, doubtful claim. It is certainly not established by a preponderance of affirmative proof. The most that can be said is that the proofs are balanced.

I shall allow the claim for \$6.50 paid by the master to one Richards at libellant's request. His testimony is corroborated by that of another witness.

The four dollars for a woolen shirt I cannot allow, for the reasons above given. The steward denies that he received it; and the master has no testimony but his own oath, against the oath of the steward.

I shall allow the steward \$8.75 which he appears to have paid for a chart, etc., furnished to the vessel. He bought the articles, perhaps, without authority, but the captain ratified the purchase, by accepting and appropriating them, and he admits they were needed by the vessel.

I at first thought the captain's claim for \$14 for a gun purchased by the steward should be peremptorily rejected, as the credit seemed

to have been given by the vendor to the man; and the master has neither paid nor was under any legal liability to pay for the steward's purchase. On examining my notes, however, I find that the clerk of the vendor swears that the gun was bought by the steward in the captain's name. If so, the credit was given to the latter,—a view of the transaction corroborated by the fact that the gun was charged in the vendor's books against the master, and not against the steward.

The master, on being applied to, seems to have assumed the liability. My recollection is that he only agreed to pay it out of the steward's wages; but my notes contain no such qualification. The gun has since been returned by the steward to the vendor, who seems not to have rescinded the sale, but to hold the gun for his lien. It would evidently be unjust to deduct this amount from the steward's claim, unless the master pays it; and he may very probably defeat any action by the vendor against him. On the other hand, if the vendor should recover from the master, injustice will have been done him by a refusal to recognize his liability and to allow him the deduction claimed. I shall, therefore, hold this item in abeyance. If the steward will produce a memorandum from the vendor rescinding the sale, or accepting a sum in settlement thereof, and releasing the master, I will disallow the deduction. Otherwise, I shall impound the sum in the registry until the master's liability is determined. The accounts will therefore stand:

Amount earned,	-	-	-	-	-	-	-	-	\$134 94
Less payments, etc., \$32.50,	-	-	-	-	-	-	-	-	32 50
									<hr/> \$102 44
Add payment for chart, \$8.75,	-						-	-	8 75
									<hr/> \$111 19
Less \$6.50, paid by libelant's request,							-	-	6 50
									<hr/> \$104 69

--For which sum a decree will be entered, but of which \$14 will be retained in the registry.

## COLLINSON v. JACKSON and others.

(Circuit Court, D. Oregon. November 1, 1882.)

## 1. AMENDMENT ON FINAL HEARING.

An amendment allowed to the bill on the final hearing, stating the value of the matter in dispute to be over \$500.

## 2. FRAUDULENT CONVEYANCE.

A voluntary conveyance of real property by a husband to his wife through the intervention of her father, which left him unable to pay his debts, or if made for a valuable consideration, as claimed, it being also made with the intent to hinder and delay creditors, to the knowledge of the wife, *held* fraudulent.

## 3. PROMISE OF WIFE TO HUSBAND.

At common law a husband and wife cannot contract with one another, and therefore the *promise* of the wife to release her right of dower in certain property of the husband's is not a valuable consideration for a conveyance by him to her of other property.

## 4. BILL BY JUDGMENT CREDITOR TO SET ASIDE CONVEYANCE.

The assignee of a promissory note brought an action against the maker, in this court, and had judgment therein, and then brought a suit to set aside a certain conveyance of the judgment debtor to his wife as fraudulent. *Held*, that the wife was entitled to show as a defense to the suit that the judgment was void for want of jurisdiction in the court to pronounce it.

## 5. ACTION IN THE NATIONAL COURTS BY THE ASSIGNEE OF A PROMISSORY NOTE.

The assignee of a promissory note may now sue in the national courts without reference to the citizenship of his assignor, (18 St. 470;) and if the assignment is absolutely and legally made, the motive which induced it in no way affects the right of the assignee to sue in said courts.

## 6. CONVEYANCE TO HINDER, ETC., CREDITORS—GOOD BETWEEN THE PARTIES.

A conveyance, though made to hinder, delay, or defraud creditors, is valid as between the parties thereto, and is only so far voidable as to enable a creditor who is prejudiced by it to enforce his demand against the grantor.

In Equity. Suit to set aside conveyance.

*M. W. Fechheimer* and *Henry Ach*, for plaintiff.

*T. B. Handley*, for the defendants *Beauchamp* and *Mary Jackson*.

*DEADY, J.* This suit is brought by *Thomas Collinson*, a citizen of California, against *Eugene S. Jackson* and *Mary Jackson*, his wife, and *Tilden Beauchamp*, her father, all citizens of Oregon, to set aside two certain conveyances of over 160 acres of real property, situated in Washington county, Oregon, as being made to hinder, delay, and defraud the creditors of said *Eugene Jackson*. The case was heard upon the bill, the answer of the defendants *Mary Jackson* and *Beauchamp*, and the replication thereto and the testimony. As against

the defendant Eugene S. Jackson the bill was taken for confessed for want of an answer by him thereto.

On the hearing, objection was made by counsel for the defendants that the value of the land—the matter in dispute—was not alleged in the bill, and therefore it did not appear that the court had jurisdiction of the suit. Thereupon the plaintiff moved for leave to amend his bill, so as to allege that the premises are of the value of \$3,000. The hearing of the cause was then concluded, but it stood over for determination until the motion to amend should be disposed of. Afterwards, upon consideration thereof, the motion to amend was allowed. 1 Dan. Ch. P. & P. 417; Story, Eq. Pl. §§ 904, 905; *Neale v. Neale*, 9 Wall. 1. The defendants Beauchamp and Mary Jackson, after due notice of the allowance and filing of the amendment, having failed to answer the same, as required by the order of the court, it was duly taken for confessed against them.

Quite a number of witnesses, including the defendants, were examined before the examiner. The examination appears to have taken a wide range; and much of the testimony is irrelevant and immaterial, and that which is otherwise is often conflicting and contradictory. But the material facts of the case are easily found, and they are substantially these:

On January 1, 1878, and for some months before, the defendant Eugene S. Jackson was indebted to the firm of Hotaling & Co., liquor dealers in Portland, in the sum of \$2,443.86, for "goods" before that time sold and delivered to him, while engaged in the saloon business at Amity and Independence; and being so indebted he gave his note therefor, payable to the order of said firm one day after date, with interest at 1 per centum per month. Afterwards, between January 28 and July 18, 1878, Jackson made three payments on this note, amounting to \$1,322.18,—the last one, of nominally \$1,000, consisting of the conveyance of his saloon at Independence, on which Hotaling & Co. had a mortgage, and for which they have not yet been able to realize \$500. On April 28, 1880, Hotaling & Co. assigned this note to the plaintiff, who brought an action thereon against the defendant Eugene S. Jackson in this court, and on May 26th thereafter obtained judgment therein, for want of an answer, for the sum of \$1,626.05 and \$60.50 costs. On December 29, 1877, Jackson conveyed the premises in controversy to his wife's father, the defendant Beauchamp, for the nominal consideration of \$1,000, and in trust that he would convey the same to the defendant Mary Jackson, which he did on the same day for the nominal consideration of \$5. At the date of these conveyances Jackson was in failing circumstances, and his assets, apart from this property, were not sufficient to pay the debt of Hotaling & Co. They consisted of an interest in his father's estate, being the undivided one-seventh of certain real property in Washington county, which he sold on November 21, 1878, to his brother, William R. Jackson, for \$1,000; the saloon property at Independence,

worth not to exceed \$500; the stock in the saloon at Amity, worth it may be, \$400; and from \$1,000 to \$1,500 of saloon accounts, worth next to nothing, and certainly not more than 25 cents on the dollar, \$315,—making in all, at the very highest estimate, \$2,215; out of which it is not probable that more than \$1,200 could have been made on execution.

By the laws of this state (Or. Laws, p. 523, §§ 51, 55) it is provided, as in chapter 5 of 13 Eliz., that every conveyance of any estate in lands "made with the intent to hinder, delay, or defraud creditors of their \* \* \* demands, \* \* \* as against the person so hindered, delayed, or defrauded, shall be void," except in the case of a purchaser for a valuable consideration, without notice of the fraud or fraudulent intent.

Upon the facts stated, the reasonable inference is that the conveyance to the wife through the father-in-law was made with the intent to hinder, delay, and defraud the creditors of Jackson; and neither the wife nor father-in-law being purchasers for a valuable consideration, it is declared void by the statute as against such creditors. Bump, Fraud. Conv. 267. But, in addition to this, there can be no doubt from the evidence that Jackson actually intended, by this conveyance to his wife, to put the property beyond the reach of his creditors, and so he and his attorney now admit and testify; and that she was fully aware of his purpose and actively participated in it. True, she denies this now, but without reason or probability. Besides, the transaction is covered with the usual badges of fraud. The conveyance to Beauchamp, made upon a mere nominal consideration furnished by the grantor, falsely recites that the consideration was \$1,000; and the consideration of \$5, upon which the conveyance to the wife purports to have been made, was also furnished her for the occasion by her husband. The pains taken to disguise the true nature of the transaction is only explainable on the theory that all parties to it were aware that a fraud was intended. The two conveyances, although made at the same time and place—Beauchamp's house—were designedly witnessed by different persons, and acknowledged before different officers, and filed for record on different days, so as to create the impression that they were independent and unrelated acts, and not the component parts of a preconcerted scheme to put the husband's property into his wife's name with the intent to prevent his creditors from reaching the same, as was the fact.

In addition to these there is the suspicious circumstance that the conveyances were made to near relations—the father-in-law and wife of the grantor. Bump, Fraud. Conv. 54. After this property was

thus conveyed to the wife,—in February, 1880,—she left her husband and has since obtained a divorce from him; and this circumstance seems to have prompted him to disclose the true nature of the transaction to his creditors, in the hope, as he testifies, that if he cannot have the benefit of the property himself by holding it in the name of a wife, it may go to the payment of his debts. The defendant Mary Jackson joined in the conveyance by her husband of his interest in his father's estate and that of the saloon property at Independence, and thereby relinquished her right of dower therein; and she testifies that when the premises in question were conveyed to her, that it was done in pursuance of a verbal agreement then made between herself and husband, by which she promised, when thereafter requested, to join him in the conveyances of the other property above mentioned. And it is now claimed that this *promise* to relinquish her dower was a sufficient consideration to support the conveyance to her.

The first answer to this proposition is that the evidence does not support it; and the second is that the promise, if proven, is void, because made by a wife to her husband, (*Pittman v. Pittman*, 4 Or. 299; *Elfelt v. Hinch*, 5 Or. 257,) and because it was not in writing. Code of Civil Proc. § 775, sub. 6. And being a void promise, it could not be enforced, and therefore it was not a valuable consideration moving from the grantee at the time of the conveyance, although it was subsequently performed. *Bump*, Fraud. Conv. 220, 222, 225. In *Howe v. Wildes*, 34 Me. 570, it was held that the note of a *feme covert* was not a valuable consideration although paid when due, and that, therefore, a conveyance by a son to his mother upon the consideration of her note was voluntary and void as against his creditors. But the conclusive answer to this claim is that, let the consideration for the conveyance to the wife be ever so valuable, she took it with full knowledge of her husband's intent to thereby hinder and delay if not defraud his creditors, and was therefore a party thereto. Again, if this conveyance had been made in consideration of an actual release of the right of dower in property worth not to exceed \$1,500, the gross inadequacy of price would itself be a badge of fraud. The property conveyed is admitted to be worth not less than \$3,000, and the husband at the date of the conveyance was only about 32 years of age. His expectation of life was about 30 years, and the wife's but little more, if any. The value, then, of this right of dower at the date of the conveyance was very trifling compared with the value of the property conveyed, and is hardly worth estimating. The



net income of \$500 for a few years, receivable 26 years hence, and discounted to its present value, would nearly represent the alleged consideration for the conveyance.

But the defendant Mary Jackson further contends, by an allegation in her answer and in the argument, that this bill cannot be maintained, because, as she alleges, the judgment which it is brought in aid of is void for want of jurisdiction in the court that gave it over the subject-matter, in that the parties to whom the note was made could not maintain an action upon it in this court, and assigned it, if at all, to "the complainant herein for the purpose of bringing such action in this court." Without stopping to determine whether this allegation is not a plea in abatement which is waived by an answer to the merits, (*Dowell v. Cardwell*, 4 Sawy. 230,) the question raised by it will be considered. But before doing so it is proper to dispose of the point made by the plaintiff that the defendant cannot attack this judgment collaterally. I think she can; and that the case falls within the rule that when the right of a third person may be affected collaterally by a judgment procured by fraud or collusion of the parties thereto, or which for any reason is erroneous and void, and he cannot bring a writ of error to reverse the same, he may allege and prove or show its invalidity in any proceeding in which it is sought to be used to his prejudice. Freeman, Judgm. §§ 335-7. The evidence upon this point is defective. It only appears therefrom that the firm of Hotaling & Co. consists of two persons,—one a resident of San Francisco and the other of Portland,—but what the nationality or citizenship of either of them is does not otherwise or further appear. But it is altogether immaterial whether the plaintiff's assignor could have maintained an action upon this note or not. True, under section 11 of the judiciary act of 1789, (1 St. 78,) the assignee of a contract, except a foreign bill of exchange, could not sue in the national courts unless the assignor could have done so. But under section 1 of the judiciary act of 1875, (18 St. 470,) this restriction upon the right of an assignee of a promissory note has been removed, and he may now sue in this court without reference to the citizenship of his assignor. Nor is it material, if true, that the assignment to the plaintiff was made for the purpose or with a view of enabling him to sue on the note in this court. If the assignment was actually made and the interest of the assignor absolutely vested in the assignee without any agreement or understanding to return it or account to the assignor for the proceeds, the motive or purpose of

the latter in making the assignment does not affect the right of the assignee to sue in this court. This is well established, both upon reason and authority. *Newby v. Or. Central Ry. Co.* 1 Sawy. 63; *De Laveaga v. Williams*, 5 Sawy. 573; *Hoyt v. Wright*, 4 FED. REP. 168; *Marion v. Ellis*, 10 FED. REP. 410.

In *Newby v. Or. Central Ry. Co. supra*, in considering a similar objection to the plaintiff's right to sue herein, as the assignee of two of the defendant's bonds, the court said: "If it appears that the complainant has the legal title to or interest in these bonds, then this plea is insufficient. They are payable to bearer, and the title to them passes by delivery, unless the contrary is shown. The motive with which they were delivered to the complainant or he received them makes no difference in this respect. Parties have a clear right to become the owners of property, real or personal, by purchase or gift, for the express purpose of maintaining a suit in this court concerning the same."

And in *De Laveaga v. Williams, supra*, in which there was a plea in abatement that the plaintiff was not the actual owner of the premises sued for, and that the conveyance to him was merely colorable, to give the court jurisdiction, Mr. Justice FIELD said:

"There is no doubt, that the sole object of the deed to the complainant was to give this court jurisdiction, and that the grantor has borne and still bears the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he chooses to do so. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor to part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of congress to proceed in the federal courts for the protection of his rights. It is only when the conveyance is executed, to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud upon the court. Such was the case of *Barney v. Baltimore City*, upon which the defendants rely. 6 Wall. 280. Here there was no such agreement, and it will be optional with the complainant to retransfer or retain the property."

The allegation or plea, therefore, in this case is absolutely immaterial, for it does not go so far as to aver that the assignment was not *bona fide*, and only colorable, but simply that the motive in making it was to give this court jurisdiction.

In the evidence there is an attempt to prove this, but it is insufficient. The circumstances relied on as showing that the assignment was not absolute and unqualified are that the consideration therefor

was merely nominal—one dollar—and that the assignor paid the expenses of the suit. But these are not inconsistent with an actual transfer, and they signify nothing when taken in connection with the testimony of the assignor and assignee, who both state that the transfer was absolute, and that there is no understanding or agreement by which the assignor is to have any of the contents of the note or the fruits of the litigation. It follows that the court had jurisdiction of the action on the note, and that the judgment therein is valid and binding on all the defendants herein for the purposes of this suit. The plaintiff is therefore entitled to have the conveyances of December 29, 1877, to the defendants Beauchamp and Mary Jackson, so far as they hinder and delay him from obtaining satisfaction of his judgment, set aside and held for naught. But it is a mistake to suppose that the property, or any portion of it remaining after the satisfaction of the judgment, will revert to the husband. As between him and his wife, the conveyances are good and vest the title in her. They are not void, but only voidable at the suit of a creditor who is thereby prevented from the collection of his debt, and then only so far as to enable him to collect it. *In re Estes*, 7 Sawy. 460. If there is any surplus of the property, or the proceeds thereof, after satisfying the judgment of the plaintiff and the costs of this suit, as it is probable there will be, it belongs to the wife.

A decree will be entered setting aside the conveyances as to the plaintiff, and directing the master to sell the property, or so much thereof as may be necessary to satisfy the plaintiff's judgment and the costs of this suit and the execution of the decree herein, and pay the remainder of the proceeds, if any, to the defendant Mary Jackson.

### LEWIS, JR., v. MEIER and others.\*

(Circuit Court, D. Kansas. November Term, 1882.)

#### 1. EQUITY—FRAUDULENT CONTRACT—NO RELIEF TO EITHER PARTY.

The general rule is that a court of equity will not interfere in behalf of either party to a contract fraudulent as to both parties, either to enforce or set aside the same, or award damages for a breach thereof.

#### 2. SAME—CORPORATIONS BOUND BY SAME RULE.

A corporation may be guilty of fraud, and if through its board of directors it enters into a fraudulent contract, it is subject to the rule above stated.

\*From the Colorado Law Reporter.

## 3. CORPORATIONS ARE BOUND BY ACTS OF AGENTS OR DIRECTORS.

A contract made by the directors of a corporation in the course and within the general scope of their powers and duties, is to be regarded as made by the corporation, although in making it the directors may have acted fraudulently. The rule is the same as that which prevails between natural persons.

## 4. RULE APPLIED—CONTRACT BY CORPORATION WITH ITS DIRECTORS.

Where a railway corporation, through its board of directors, entered into a contract for the construction of a part of its road with certain persons, some of whom were directors of the company, and, in pursuance of that contract, executed its bonds in a large sum, secured by mortgage upon its property, *held*, that although the contract be held void, yet the corporation, being itself a party to the fraud, could not maintain a bill to set aside and cancel the mortgage as a cloud upon its title.

*J. P. Usher*, for complainant in cross-bill.

*Mr. Glover* and *Mr. Shepley*, for defendants.

MCCRARY, C. J. This suit was originally brought to foreclose a mortgage executed by the Kansas Pacific Railroad Company to certain trustees, to secure bonds to the amount of \$6,500,000. The original bill has been dismissed, and the case stands upon a cross-bill filed by the defendant company, in which it is alleged that the mortgage above referred to is fraudulent and void, and ought, therefore, to be canceled as a cloud upon its title. It is alleged that said mortgage was executed as part of a scheme whereby the directors of the company united with certain others to enter into certain contracts with the company to build a portion of the company's railroad, and to receive certain considerations therefor. In other words, it is alleged that the directors of the company were members of a construction company, to which the bonds secured by said mortgage were issued, and that they contracted fraudulently with themselves. Conceding, for our present purposes, the truth of these allegations, the question arises, can the defendant company be granted the affirmative relief prayed for? The general rule is that a court of equity will not, in such cases, interfere in favor of either party, either to enforce or set aside the contract, or to award damages for its breach. The parties being *in pari delicto*, the court will leave them where it finds them. If this were a contract between natural persons, there could be no doubt about the application of this doctrine; but it is said that the rule does not apply to the defendant corporation, because, while the contract was made in the corporate name, the corporation is not, within the meaning of the rule, a party to it, since in making it the directors exceeded their authority. To sustain this view would be, in effect, to hold that a corporation can in no case be guilty of fraud; for, being an artificial being, it can act only through agents, and it

would be impossible in any case to show that the charter of a corporation expressly authorized the perpetration of a fraud. It is, however, well settled that a corporation may be guilty of a fraud. The courts have gone further, and held such artificial persons liable in tort in certain cases. The true rule is that such acts as are done by the directors in the course and within the scope of their powers and duties, are to be regarded as the acts of the corporation. Such is the rule, even if the acts are unlawful and tortious. 2 Hil. Torts, 322; *Copley v. G. & B. Sewing-Machine Co.* 2 Woods, 494; *Railroad Co. v. Quigley*, 21 How. 202; *Sandford v. Hundy*, 23 Wend. 260; *Brokaw v. N. J., etc., Transp. Co.* 32 N. J. Law, 331; *Fogg v. Griffin*, 2 Allen, 1; *Rives v. Plank-road Co.* 30 Ala. 92; *Litchfield Bank v. Peck*, 29 Conn. 384; *Lee v. Village of Lundy Hill*, 40 N. Y. 442; *Perkins v. Railroad Co.* 24 N. Y. 213.

These authorities abundantly show that if the directors or agents employed by a corporation conduct themselves fraudulently, so that if they had been acting for private employers such employers would have been affected by their frauds, the corporation is, in like manner and to the same extent, affected by them.

In other words, the settled doctrine is that a corporation can no more repudiate the fraudulent acts of its agents than an individual can. The rule is the same as to both. The doctrine as applicable to private individuals is familiar. The principal is liable for the acts of the agent, not alone in cases where they are expressly authorized, but also in all cases where such acts come within the range of the agent's duties.

In the case of the *Railroad Co. v. Quigley*, *supra*, Mr. Justice CAMPBELL says: "The result of the cases is that for acts done by the agent of a corporation, either *in contractu* or *in delicto*, in the course of its business or of their employment, the corporation is responsible as an individual is responsible under like circumstances."

In that case the corporation was sued for libel, and held liable, the defense that the defendant was a corporate body, with defined and limited powers, being overruled. It was argued that the corporation, being a mere legal entity, it was incapable of malice, which is a necessary ingredient of a libel. The defense there, as here, was that the directors acted outside of their authority, and bound themselves as individuals only. But the court said, (folio 209 :) "To support this argument we would be required to concede that a corporation could only act within the limits and according to the faculties determined

by the act of incorporation, and that, therefore, no crime or offense can be imputed to it; that, although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created, by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents; and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance."

It is true that the question there was whether the corporation was liable in damages for injuries caused by a malicious libel; but if the corporation is liable for *one* of the consequences of an unauthorized and illegal act of its agents, on the ground that the act was done "to accomplish objects for which it was created," it is clearly liable for *all* such consequences. Here, one of the consequences of the illegal and fraudulent contract is that neither party shall be heard in a court of equity to demand any relief either enforcing or annulling the same. This is a rule of great general importance, and one which the courts are often called upon to enforce in the interest of sound morality and for the public good. To sustain the present cross-bill would be to determine that the rule has no application to corporations, and that these artificial persons, who act from necessity only through agents, may, through such agents, enter into fraudulent and immoral contracts, and, after receiving their benefits, may ask a court of equity to cancel them, on the ground that their agents made them without authority.

We cannot give our assent to such a doctrine. A very large proportion of the most important business of the country is transacted by these artificial persons, and they control vast aggregations of wealth and exercise vast powers. It is the sound policy of the law to apply to corporations, as far as possible, those rules of good conscience and equity which are enforced as between man and man. The contract now in controversy was made by the board of directors for the purpose of constructing a railroad, which the corporation was clearly authorized to construct. It was therefore within the general scope of their powers. The corporation may be permitted to defend against the contract on the ground that it was fraudulent as alleged; but if so, it is not because the corporation has any special claims to the favor of a court of equity in that regard, but solely upon the ground

that neither party to a fraudulent contract (both having participated in the fraud) can demand its enforcement. The company is not entitled to affirmative relief, and therefore the cross-bill is dismissed.

FOSTER, D. J., concurs.

### MOSGROVE and others v. KOUNTZE and others.

(Circuit Court, D. Nebraska. November Term, 1882.)

#### 1. EQUITY—PRACTICE—SUPPLEMENTAL BILL.

Leave will not be granted after decree to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence, have been ascertained, and pleaded by way of amendment in the original suit.

#### 2. SAME—CHANGING PARTIES.

The fact that the complainant desires to drop out of the case some of the parties defendant to the original bill, does not of itself give him the right to proceed by supplemental bill, especially when it appears that such change of parties is not essential.

#### 3. REMOVAL OF CAUSE—JURISDICTION OF CIRCUIT COURT.

A circuit court of the United States has no jurisdiction of a case commenced in a state court on a contract by an assignee, and removed thence to said court, unless the action might have been brought originally in the circuit court by the assignor, and it is probable that a plea to the jurisdiction would be entertained in a supplemental proceeding.

#### Application for Leave to File a Supplemental Bill.

It appears from the record that about the year 1877 John I. Redick recovered a judgment in the district court for Douglas county, Nebraska, for about \$2,500 against the Omaha & Northwestern Railroad Company, which judgment was afterwards assigned to one James E. Brown, who commenced a suit in equity in the district court of Burt county, Nebraska, against John A. Horback, Henry W. Yates Herman Kountze, Francis Smith, Frank Murphy, and Sally A. Horback, for the purpose of subjecting to the payment of said judgment certain real estate in the bill described.

The ground of the action was that the said respondents, some of them being directors of said railroad company, had entered into a contract with the company to construct a portion of the line of railway, which contract was contrary to public policy and void; and that they had received the land sought to be subjected as a part of the proceeds of said contract, and therefore held it in trust for the creditors of said company. It was in the original bill averred that the respondents had received

under said contract, besides the real estate then sought to be subjected, about 45,000 Burt county bonds, and some \$16,000 per mile in bonds on the line of the railroad constructed, being about \$112,000, which they had converted to their own use; but it was not sought by the original bill to do more than subject the real estate to the payment of said judgment.

Pending said suit, said James E. Brown departed this life, and the present complainants were substituted as his administrators.

A decree was rendered in favor of the complainants which reserved their right, in case the real estate should not sell for sufficient to pay the judgment, interest, and costs, to apply to the court for further relief in the premises. Complainants ask leave now to file a supplemental bill for the purpose of subjecting the personal property still remaining in the hands of said respondents as the proceeds of said illegal contract to the payment of the balance which is alleged to be due upon said judgment. This personal property is said to consist of the bonds and stock received by respondents as the fruits of said contract, or proceeds thereof, amounting to between \$75,000 and \$80,000.

The grounds upon which this leave is asked, as they appear in the supplemental bill, are, in substance, as follows:

(1) That it has been ascertained since the filing of the original bill that all the respondents in said original bill are not directors and trustees of said railroad company, and that the prayer of said original bill was not broad enough and sufficient to grant complainants such relief as has since been shown they were entitled to. (2) That it has since appeared by proof, and on trial of said cause, that the respondents hold in their possession the bonds above mentioned as the fruits of the contract above referred to. (3) That the complainants had no means of knowing, and did not know, at the time of the filing of the original bill, that the respondents held in their possession the proceeds of said bonds, which they had converted to their own use.

It is insisted by respondents that it appears from the record that the facts set forth in the supplemental bill might have been ascertained and pleaded by way of amendment to the original bill.

*Redick & Redick*, for complainants.

*J. D. Howe*, for respondents.

MCCRARY, C. J. It is well settled that leave will not be granted, after decree, to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence, have been ascertained and pleaded by way of amendment in the original suit. This is conceded by the learned counsel for complainants, but they deny that there is anything in the record which was sufficient to bring



home to complainants notice of the facts now averred in time to have presented the same by way of amendment to the original bill. By reference to the foregoing statement it will be seen that the original bill itself alleged, among other things, that the respondents therein had received \$45,000 in Burt county bonds, and \$16,000 per mile in bonds on the line constructed, being about \$112,000, which they have converted to their own use. It thus appears that at the time of filing the original bill the complainants had information which would have enabled them to pursue and subject the personal property, as well as the real estate, which defendants had received under said contract. It is said in answer to this suggestion, and it is in fact elsewhere alleged in the supplemental bill, that the complainant did not know, at the time of the filing of the original bill, that the respondents held the proceeds of said bonds, which they had converted to their own use, but the allegation of the original bill was precisely to this effect. It is there distinctly averred that the defendant held all the property received upon said contract in trust for the railroad company, the contract under which they obtained it being null and void.

It follows, therefore, that, even if we do not look beyond the allegations of the original bill, we have ample proof that the fact sought to be set up by way of supplemental bill was, or might have been, known to the complainants at the time the original suit was commenced. But, as already stated, it is sufficient if it appears that the facts sought to be set up by way of supplemental bill were known in time to have been presented by way of amendment to the original bill. It is not enough that they were not known when the original bill was filed.

By reference to the answer filed in the original cause it will be seen that the facts concerning the contract, and the receipt thereunder by defendants of the land, and of the county and railroad bonds above mentioned, were fully disclosed, and there is no allegation that the defendants had paid the same over to the railroad company, or had any purpose to do so. On the contrary, it appeared from the face of the answer, beyond question, that the defendants held said property, including both real estate and personal property, claiming the right to it, and denying any liability on their part to pay it over to the railroad company. In other words, the theory of their defense was that they did not hold it as trustees for the railroad company. The answer disclosed the fact (which appears to have been known to the complainants when the original bill was filed) that the defendant held

the personal property received under said contract in precisely the same way that they held the land, and thus the complainants were informed that they had the same right of recovery as to both. It appears, therefore, that the complainant chose to proceed against the real estate alone, doubtless upon the expectation that it would be entirely sufficient to satisfy his judgment. If in this he was mistaken it does not by any means follow that he can at this late day file a supplemental bill in the same case for the purpose of reaching other and different property. The fact that the complainant desires to drop out of the case some of the parties defendant to the original bill does not of itself give him the right to proceed by supplemental bill.

It does not appear that the plaintiff's right of recovery as to the personal property rests upon any different ground from that upon which he proceeded against the real estate. Therefore, the fact of his recovery in the original suit shows that a change of parties was not and is not essential.

I am of the opinion that the facts set forth in the supplemental bill in this case were sufficiently disclosed in the original bill and answer to have enabled the complainants to set them up by way of amendment before the replication in the original suit, and that, therefore, they cannot be presented now by way of supplemental bill; besides, it is clear that under the twenty-ninth rule in equity the court would have granted leave to amend even after replication in such a case as this. These considerations relieve the court from the necessity of considering a question of jurisdiction which might otherwise arise. It has been repeatedly held in this circuit that this court has no jurisdiction of a case commenced in a state court on a contract by an assignee, and removed thence to this court, unless the action might have been brought here originally by the assignor.

It is probable, I think, that, although it is now too late to raise the question as to the validity of the original proceedings and decree, the question of jurisdiction might be raised upon a supplemental bill, seeking to enlarge and extend the relief prayed, so as to include other property. The general rule is that a question of jurisdiction may be raised at any time, and as the original proceeding was wholly concluded, and a final decree rendered and fully executed, it seems probable that a plea to the jurisdiction would have to be entertained as against any supplemental proceedings. It is not, however, necessary to consider this point, nor even to determine whether the plea to the

original bill would have been good, as the present application must be disposed of on the other ground above discussed.

Let the order granting leave to complainants to file a supplemental bill be set aside, without prejudice to their right to bring an original bill for the same purpose.

**PETERS and others v. LINCOLN & N. W. R. Co. and others.\***

(Circuit Court, D. Nebraska. October, 1882.)

**1. RAILROAD CORPORATION—POWER TO LEASE—STATUTE CONSTRUED.**

Under the statute of Nebraska, the lease of a line of railway, or arrangement to lease, executed by one railroad corporation to another, to be valid must be assented to by a vote of at least two-thirds of the stockholders of each corporation, in stockholders' meeting assembled.

**2. SAME—AGREEMENT TO LEASE MADE IN ADVANCE OF CONSTRUCTION, TO SECURE STOCK SUBSCRIPTIONS.**

No agreement to execute such a lease, made in advance of the construction of a railroad, can be specifically enforced, unless it is subsequently ratified by a vote of the stockholders, as provided by the statute.

**3. CORPORATIONS—RIGHTS OF STOCKHOLDERS.**

Persons subscribing to the stock of a corporation must take notice of the law creating it and defining its powers, and if the directors, in order to secure stock subscriptions, propose to do that which they are prohibited from doing by the statute, no subscriber can be heard to say, as against the corporation, that he has been misled and deceived thereby.

**Demurrer to Amended Bill.**

*E. Wakeley*, for complainant.

*T. M. Marquett*, for defendants.

**McCrary, C. J.** Upon consideration of the demurrer to the original bill in this case it was held that under the statute of Nebraska the lease of a line of railroad, or an agreement to lease, executed by one railroad corporation to another, to be valid, must be assented to by a vote of at least two-thirds of the stockholders of each corporation, and that such assent must be expressed in a stockholders' meeting. It was therefore held that the agreement to execute such a lease, made without a meeting of stockholders, and without the assent of the requisite number of stockholders in meeting assembled, was invalid, and could not be enforced. 2 McCrary, 275; [S. C. 12

\*From the Colorado Law Reporter.

FED. REP. 513.] Since this ruling an amended bill has been filed, in which it is alleged, in substance, as follows:

*First*, that on the twenty-fourth day of June, 1879, the Atchison & Nebraska Railroad Company, in order to promote its own interest by securing the construction of the line of the Lincoln & Northwestern Railroad, issued a circular inviting persons to subscribe to the stock of the latter company, and stating that it was proposed that the company first named should lease the new road (meaning the road to be built by the last-named company) for a term of 30 years, and pay as an annual rental therefor 35 per cent. of the gross earnings of the said new road, which, it was estimated, would provide for the payment of interest on the new bonds; *second*, that the members of said board of directors of the first-named company were stockholders therein, and held in the aggregate more than two-thirds of the capital stock thereof, and that most if not all the other stockholders assented to the sending out of such circulars and proposal; *third*, it is further alleged, upon information and belief, that said members and stockholders did not intend to comply with said proposal if the same should be accepted, but, on the contrary, intended, after the same should be accepted and the proposed stock should be taken and the money therefor should be paid to said Lincoln & Northwestern Railroad Company, to hinder and prevent the making and execution of said lease, and to oppose and vote against the same as stockholders in case a stockholders' meeting should be called; *fourth*, the complainants subscribed for various shares of the stock of the last-named company, and paid for same in full upon the faith of the proposal embodied in the aforesaid circular, and relying upon the same.

The prayer is that the Lincoln & Northwestern Railroad Company may be decreed to execute a lease of its road to said Atchison & Nebraska Railroad Company according to the terms and conditions of said proposal, etc., and that said last-named company may be decreed to receive said lease, and to perform and execute the same, and for an injunction to restrain the execution of a lease to the Burlington & Missouri River Railroad Company in Nebraska.

It is apparent that this relief can only be granted upon the theory that there has been a valid agreement to lease, which agreement can be enforced by the decree for specific performance.

The facts alleged do not show the existence of such an agreement; they do not show a compliance with the statute, which plainly requires, as a condition precedent to the execution of such a lease, that the directors of each of the corporations shall call a meeting of the stockholders of each, at which meeting the holders of at least two-thirds of the stock represented at such meeting, in person or by proxy, and voting thereat, shall assent thereto.

The amended bill avers certain facts tending to show the assent (outside of any meeting of the stockholders) of two-thirds of the

stockholders of one company. This would not be sufficient even if the allegations applied to both companies; much less is it sufficient where they apply to one only.

Persons subscribing to the capital stock of a corporation are bound to take notice of the law creating it and defining its powers, and if the directors, in order to secure subscriptions to such stock, propose to do that which they are prohibited from doing by the terms of the statute defining their powers, no subscriber can be heard to say, as against the corporation, that he has been misled and deceived thereby. All that subscribers to the capital stock in this case had a right to assume, was that the lease would be executed in accordance with law, provided a meeting of stockholders should be held, and the same should be assented to by the holders of two-thirds of the stock of both corporations concerned.

Every subscriber to the stock of the Lincoln & Northwestern Railroad Company was bound to know that no valid lease could be executed, except in compliance with the statute above referred to.

The allegation that the directors of the Atchison & Nebraska Railroad Company was bound to know that no valid lease could be executed, except in compliance with the statute above referred to.

The allegation that the directors of the Atchison & Nebraska Railroad company acted in bad faith, and did not intend to vote for a lease, in case a stockholders' meeting should be called, is not sufficient to authorize the execution and enforcement of such a lease contrary to the statute and without the assent of the stockholders, as required thereby.

The demurrer to the amended bill is sustained.

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### BUSH v. UNITED STATES.

(Circuit Court, D. Oregon. November 8, 1882.)

#### PRIORITY OF THE UNITED STATES.

The priority of the United States under sections 3466, 3467, of the Rev. St. does not attach in the life-time of an insolvent debtor unless his property is taken by process of law, as in bankruptcy, insolvency, or attachment, or he makes a voluntary assignment thereof to a third person for the benefit of his creditors; and a judgment or judgments confessed by such debtor for an amount equal to the value of his assets, with intent to hinder, delay, or defraud the United States, is not such an assignment.

Bill of Review.

*George H. Williams*, for plaintiffs.

*James F. Watson*, for defendants.

DEADY, D. J. This case was before this court on October 2d,\* on a motion of the district attorney to dismiss the bill of review for want of jurisdiction. The motion having been denied, the defendant demurred, and the cause was argued and submitted on the bill and demurrer.

The first question for consideration is, had the United States, upon the facts stated and found, a right of priority of payment out of the property of Griswold on January 6, 1879, by virtue of section 3466 of the Revised Statutes? which reads:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

At this date it appears that Griswold confessed judgments to sundry persons for an aggregate sum, which, together with his indebtedness to the United States and sundry mortgage creditors, far exceeded the value of his assets, and that said judgments, with the exception of the one to the plaintiffs herein for \$348.82, were based upon fictitious claims and confessed with the intent to hinder, delay, and defraud the United States in the collection of a claim against Griswold, then in suit in this court, and upon which it obtained judgment against him, on July 30, 1879, for \$35,228, and \$2,821.60 costs and disbursements. Upon this state of facts it was tacitly admitted by counsel, and assumed by the court, on the hearing of the original case, that the priority of the United States attached to the property of Griswold, subject to the liens of the valid mortgages thereon. It is admitted that the statute giving the priority of payment was not applicable to this case, unless Griswold had made a voluntary assignment of his property; and it is also admitted that he had not done so, unless the confessing of these judgments amounted to such assignments.

\*See 18 FED. REP. 625.

There is no doubt but that the effect of these judgments by means of the lien they carried, when docketed, unless set aside at the suit of creditors for fraud, was practically to transfer whatever interest Griswold had in the property in question to the plaintiffs therein. But, upon further reflection and examination, I am satisfied that they did not amount to or operate as an assignment within the purview of the statute. The latter is only applicable to cases where the debtor's estate, either by his death, legal bankruptcy, or insolvency, has passed into the hands of an administrator or assignee for the benefit of his creditors, or where the debtor himself has voluntarily made such disposition of it. It does not apply, then, to a conveyance, assignment, or transfer, by whatever means accomplished, to a real or pretended creditor or creditors in payment or satisfaction of a debt or claim. There must be in some way an assignment of the debtor's property to a third person for distribution among his creditors before the statute can be invoked, and then it operates directly upon the assignee by requiring him to pay the claim of the United States first, and making him personally liable therefor if he does not. Section 3467, Rev. St. The following authorities bear, with more or less directness, upon these conclusions: *U. S. v. Fisher*, 2 Cranch, 390; *U. S. v. Hooe*, 3 Cranch, 90; *Conard v. Atlantic Ins. Co.* 1 Pet. 438; *Beaston v. Farmers' Bank of Delaware*, 12 Pet. 132; 1 Kent, Comm. 247; *U. S. v. Canal Bank*, 3 Story, 81; *U. S. v. McLellan*, 3 Sumn. 350; Conkl. Treat. 723.

It follows that so much of the decree as provides that lot 8, in block 10, and the W.  $\frac{1}{2}$  of lots 1, 2, 3, and 4, in block 73, in the town of Salem, shall be subject to the payment of the judgment of the United States, after they have been sold on legal process from the state court and before the entry of said judgment, upon the assumption that the priority of the United States had attached thereto prior to such sale, to-wit, on January 6, 1879, is erroneous and must be reversed, and a decree entered dismissing the bill as to the plaintiffs in error.

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GUINN v. IOWA CENT. RY. CO

(Circuit Court, S. D. Iowa. 1882.)

CORPORATION—JURISDICTION.

The "principal place of business" of a corporation is no test of residence, whether of a corporation or of a natural person, as a person may reside in one state and have his principal or sole place of business in another state.

*Trimble, Caruthers & Trimble*, for plaintiff.

*H. E. J. Bourdman*, for defendant.

LOVE, D. J. The principle laid down in the case of *McCabe v. Ill. Cent. R. Co.* 13 FED. REP. 827, is decisive of the present case. The defendant is an Iowa corporation, having its principal place of business at Marshalltown, in the central division of the district of Iowa. Process was served upon its agent, C. M. Miller, at the town of Albia, in the southern division, returnable at Keokuk. The late act of congress, creating circuit court jurisdiction in the several divisions of the district of Iowa, provides, in substance, that suit shall be brought in the division in which the defendant has his residence. The defendant herein now moves to have the cause transferred to the central division on the ground that the residence of the defendant is at the principal place of business, which is in the central division. In addition to what is shown in the *Case of McCabe, supra*, it may be said that the "principal place of business" is no test of residence, whether of a corporation or natural person. A natural person might reside in one state and have his principal, or, for that matter, his sole place of business in another state. I presume that thousands of persons reside in Jersey City and have their principal place of business in New York, and many no doubt reside beyond the limits of the state of New York and carry on their *sole* business in the city of New York.

The motion is denied.

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UNITED STATES *v.* HULL.\*

(District Court, D. Nebraska. November Term, 1882.)

1. INDICTMENT—FALSE CLAIMS AGAINST THE UNITED STATES.

Any person who makes or causes to be made, or presents or causes to be presented, any false claim against the United States, knowing the same to be false, or who, for the purpose of aiding another to obtain the payment of a false claim, by making or using, or causing to be made or used, any false bill, account, claim, certificate, affidavit, or deposition, knowing the same to be false, may be punished under the provisions of section 5438 of the Revised Statutes of the United States.

2. SAME—STATUTE CONSTRUED.

The section above cited is not limited in its operation to false claims presented by the accused on his own behalf, but applies as well to such claims presented by an attorney, agent, officer, or other person presenting or aiding in the collection of a false claim, knowing it to be false.

\*From the Colorado Law Reporter.



## 3. INDICTMENT—DUPLICITY.

An indictment which charges that the defendant made, and caused to be made, the false voucher, certificate, or claim, and that he "presented and caused to be presented," is not bad for duplicity because the statute employs the disjunctive "or" instead of "and."

*Mr. Lamberton, U. S. Atty., and Mr. Webster, for the United States.  
Mr. Woodworth and Mr. Thurston, for defendant.*

MCCRARY, C. J., (*orally.*) We have considered the motion to quash the indictment in this case, and I am now ready to state the conclusions arrived at.

The indictment in the case charges, in substance,—*First*, the making of false claims against the United States; and, *second*, aiding another person to obtain payment of false claims against the United States. There are a number of counts in the indictment, but I believe they are all conceded to be substantially alike, and therefore it will be sufficient to consider the first count. This, after certain allegations setting forth that defendant was custodian of the United States court-house and post-office at Lincoln, and certain other allegations rather introductory in their character, not necessary to be repeated, proceeds thereafter to say that "defendant did willfully, unlawfully, and feloniously make and cause to be made, and present and caused to be presented, to an officer of the treasury department of the United States of America, a certain false, fraudulent, and fictitious claim and account against the United States of America for payment and approval for 806 yards best quality Napier matting, at 80 cents per yard, alleged in said account to have been purchased from one Albert M. Davis for the use of said building, at a price of \$644.80, which said claim was false, fictitious, and fraudulent, as said Dwight G. Hull well knew, and that said goods were never delivered by said Albert M. Davis at the price named, or at the place named. Then follow allegations that the defendant, for the purpose of aiding to obtain payment of said claim, unlawfully and feloniously did make and use, and caused to be made and used, a certain false bill, voucher, receipt, certificate, or account, which is copied in the indictment, followed by the allegation that said voucher, receipt, bill, or certificate was and is false, fictitious, and fraudulent as to the cost or price of said matting, as the said Dwight G. Hull well knew; and the grand jury aforesaid, upon their oaths aforesaid, present that the said Albert M. Davis never received the sum of \$644.80 for said matting from the United States or any other person."

Here is a very distinct and sufficient allegation of the two offenses to which I have referred, namely: *First*, the making and presenting of a false claim; and, *second*, aiding another to obtain the payment of a false claim. We are of the opinion that these offenses, as here charged, come clearly within the provisions of section 5438 of the Revised Statutes of the United States, which provides that "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing said claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be imprisoned," etc.

It is not contended by counsel for defendant that this section of the statute does not describe in general terms the offense charged in the indictment; but, as I understand the counsel, they do insist that the statute applies only to a party who presents a false claim on his own behalf, and does not apply to a person who presents a false certificate or voucher on behalf of some other person, or in the name of some other person. We are unable to concur in this view of the statute. It appears on the face of the statute that it is intended to apply to a case where a person makes, or causes to be made, a false statement of this character, or where he obtains, or is guilty of aiding to obtain, the payment or approval of any such false claim. The use of this language clearly implies that the statute is intended to cover a case where an attorney, agent, officer, or other person undertakes to get a claim which is false and fraudulent allowed in his own behalf, or in behalf of any other party; otherwise the language "aiding to obtain" would have no meaning whatever. It is a matter of history that this legislation was intended mainly to put a stop to the practice which was said to prevail at the city of Washington and elsewhere, where claim agents and lobbyists, acting on behalf of others, were in the habit of manufacturing false and fictitious testimony—pension agents, and other agents of that character. We are clearly of the opinion there is nothing in the point to which I have referred.

It is argued that the indictment is bad for duplicity, because it alleges that the defendant "made, or caused to be made," this false voucher, certificate, or claim, and that "he presented, and caused to

be presented;" but the authorities are abundant in support of the principle that it is no objection to an indictment to say that "defendant did, or caused to be done," a particular act which is punishable by criminal statute. The allegation is good in that form, although the statute may employ the disjunctive conjunction "or" instead of "and."

The following are some of the authorities upon this point: *Com. v. Twitchell*, 4 Cush. 74; *State v. Fletcher*, 18 Mo. 426; *Durham v. State*, 1 Blackf. 33; *State v. Meyer*, 1 Speer, (S. C.) 305; *State v. Kuns*, 5 Blackf. 314; *State v. Morton*, 27 Vt. 310; 2 Archbold, Crim. Law, 810.

See *U. S. v. Corbin*, 11 FED. REP. 238; *U. S. v. Moore*, 2 Low. 232.

### NICHOLS v. HORTON.

(Circuit Court, N. D. Iowa, E. D. December 8, 1882.)

#### 1. PRIVILEGE OF WITNESS—EXEMPTION FROM SERVICE OF CIVIL PROCESS.

Defendant, while in attendance as a party and witness upon the trial of a case in Howard county, Iowa, by telegram directed and instructed the sheriff of Mower county, Minnesota, to seize by writ of attachment the goods of plaintiff, whereupon plaintiff immediately brought suit for the wrongful taking thereof, and served defendant with notice of the commencement of such suit. Held, that defendant could not protect himself from responding to the action brought against him by the alleged owner of the property, under the privilege usually accorded to witnesses and parties in attendance upon a trial of a cause in court.

#### 2. SAME—EXCEPTION TO RULE.

Where parties or witnesses, while in attendance upon the trial of a cause, including going to and returning from the place of trial, do no wrong or injury to third parties, they may claim exemption from service of civil process; but where they lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them by third parties, they cannot invoke this privilege, but must be deemed to have waived the exemption. The trial upon which the party or witness is in attendance must not, however, be interfered with by such service.

This action was commenced in the circuit court of Howard county, Iowa. The defendant is, and was at the time of the beginning of the action, a resident and citizen of Minnesota. Service of the original notice was had upon defendant at Cresco, Howard county, Iowa, on the fourteenth day of April, 1882.

The petition alleges that plaintiff is the owner of certain personal property; that the same was in his possession; that while he (the

plaintiff) was removing said property to Dakota territory it was levied on by the sheriff of Mower county, Minnesota, by virtue of a writ of attachment issued from the district court of Olmsted county, Minnesota, in an action wherein the present defendant is plaintiff and William O. and W. Nichols are defendants; that such levy was for the benefit of the defendant herein, and was made by his express directions; that such levy and taking possession of said property were wrongful and to the great damage of plaintiff.

At the September term, 1882, of the circuit court of Howard county, to-wit, on the twenty-sixth day of September, being the second day of the term, the defendant filed a petition for the removal of the cause into the federal court, which petition was granted, and the cause has been duly filed in this court. The defendant took no action in the state court save only the filing the proper petition and bond for the removal of the cause into this court.

On the first day of this term of this court, and as soon as it could be done after the removal of the cause, the defendant filed a motion to quash and set aside the notice and the service thereof upon defendant, being the notice served in the state court upon defendant, notifying him of the commencement of the action, for the reasons that, when said notice was served upon him, the defendant was a resident and citizen of Minnesota; that he was in Iowa only temporarily, and for the sole purpose of attending as a party and witness upon the trial of a suit then pending in the court of Howard county, Iowa, and that service of the notice was made on him while he was in Iowa, for the above purpose, and before the cause upon which he was in attendance was heard; that being thus in attendance upon the court as a party and witness, he was privileged from being served by legal process in a civil action.

It is shown by the affidavits filed in connection with this motion that the defendant went to Cresco, Iowa, on or about the tenth or eleventh of April, 1882, for the purpose of attending the trial in the cause then pending at that place; that previous to going to Iowa, and about the eighth day of April, he instituted an action in Olmsted county, Minnesota, against William O. and W. Nichols, and sued out a writ of attachment therein, and caused the same to be placed in the hands of the sheriff of Mower county, with instructions to levy the same upon the property which was subsequently taken by the officer; that he instructed the officer to keep watch for said property, and informed him that he was going to Iowa, and that he would endeavor to ascertain when the property would be shipped from Iowa

through Minnesota, and would notify the sheriff by telegraph of the facts, in order that the sheriff might make the levy; that while the defendant herein was at Cresco, Iowa, to-wit, on the eleventh day of April, the defendant sent a telegram to the sheriff of Mower county, notifying him that the property was in transit, and to make the levy; that this telegram was not received until the next day by the sheriff, who had already found the property, and executed the writ of attachment by taking possession of the property; that on the thirteenth and fourteenth days of April the defendant sent telegrams to the sheriff of Mower county directing him to hold the property under the writ of attachment.

Under this state of facts it is urged in behalf of plaintiff that the privilege claimed, of exemption from service of process in a civil action when in attendance upon another court as a party and witness, does not properly apply; and, further, that it is now too late to assert the claim, for the reason that the defendant did not make the claim in the state court, but simply appeared generally in the action, and filed a petition for removal into this court upon the ground that there was a controversy pending between the parties in which the amount involved exceeded \$500.

*H. C. McCarty*, for plaintiff.

*Reed & Marsh*, for defendant.

SHIRAS, D. J. The general principle that parties, witnesses, and jurors are privileged from service of legal process in civil actions while in good faith they are in attendance upon the hearing of a cause in court, is well recognized by the authorities, and in the case of parties and witnesses this exemption from service of process extends to the taking of testimony before a master or commissioner preparatory to the final submission of the cause to the court. In point of time, the privilege exists during the time fairly occupied in going to and returning from the place of trial or hearing, as well as during the time when the party is in actual attendance at the place of trial. See *Brooks v. Farwell*, 2 McCrary, 220; [S. C. 4 FED. REP. 166;] *Juneau Bank v. McSpedan*, 5 Biss. 64; *Bridges v. Sheldon*, 7 FED. REP. 17; *Plimpton v. Winslow*, 9 FED. REP. 365; *Lyell v. Goodwin*, 4 McLean, 29; *Perron v. Grier*, 66 N. Y. 124; 1 Greenl. Ev. §§ 316, 317.

Although this rule came into existence at a time when, in civil causes, the defendant might be arrested and held in custody to answer the writ unless bail were given, and although that fact had doubtless great weight in bringing about the adoption of the rule, as it is manifest that if a party, juror, or witness attending upon one

cause could be arrested in another and kept in custody, it would impede and possibly defeat the proper disposition of the cause on trial; yet this was not the sole or only reason for the adoption of the rule in question. If it had been the sole reason for the rule, then, upon the abolition in any state of the right to arrest a defendant in a civil cause, the rule itself might be deemed to have been thereby abrogated. Experience, however, has shown that in order that causes may be fully heard, and the orderly administration of justice may be assured, it is necessary that parties, witnesses, and jurors shall be protected against service of process in civil actions while they are in good faith in attendance upon the trial of causes. If parties or witnesses are liable to be sued when in attendance upon the court in which the cause with which they are connected is pending, and by reason thereof they may be compelled to appear and answer in a foreign tribunal, or in one different and far distant from that wherein they could alone have been sued, had they not been in attendance upon the court, the fear thereof might well deter them from attending at the place of trial; and if they were beyond the reach of a subpoena, a party might, as a consequence, be deprived of the personal presence and testimony of witnesses whose absence would be fatal to his cause.

Without, however, endeavoring to give all the reasons why the privilege in question is still recognized and enforced in states under whose laws no arrest of the person can be made, as part of the process for the institution of civil actions, it is sufficient to say that the rule exists and is in force, and in all cases coming within its reason and true purpose this court will not hesitate to enforce it. Is it, however, a rule without exception, to be rigorously enforced in every case without reference to circumstances? Suppose a party or witness is in attendance upon a trial in a given case, and while so in attendance he wrongfully takes or injures the property of a third person, or inflicts bodily injury upon him, is such third person to be debarred from bringing an action at once against the wrong-doer, because he happened to be a party or witness in some cause then pending for trial, but with which the third person has no connection? Suppose a party or witness comes from a distant state, or possibly from a foreign country, to attend upon a trial, and while on his journey, he commits a wrong, is the party thus injured obliged to submit to the wrong and postpone the bringing of an action for redress, until the wrong-doer has returned to his home, which, as suggested, may be in a foreign country, or, if in the United States, may be so far dis-

tant as practically to defeat all remedy if the injured party is obliged to follow him to his home? Suppose a party or witness, when in attendance upon a trial, becomes indebted to a hotel-keeper for his board, or to a merchant for goods purchased, to be paid for on delivery, and the debtor refuses to pay his just debts thus contracted, are the creditors powerless in the premises, and are they to be compelled to await the return of the debtor to his own home before they can invoke the protection of the law? If such a rule should be upheld, would it not be enabling parties and witnesses to perpetrate wrongs upon third parties, and then to escape responsibility by invoking the privilege attaching to their character as parties or witnesses in pending litigation, thus converting that, which was originally intended as a shield for their protection, into a weapon of offense, to the injury of innocent third parties? Where the parties or witnesses, while in attendance upon the trial, including going to and returning from the place of trial, do no wrong or injury to third parties, they may claim the protection of the privilege of exemption from service of civil process, but where they lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them on behalf of third parties, then it would seem just to hold that they cannot invoke the privilege in question, but that by such action on their part they must be deemed to have waived the exemption. In the exercise of the right of bringing suit in such cases, it would be the duty, however, of such third party, in instituting his proceedings for the protection of his rights, to see to it that he does not in fact interrupt the trial of the cause upon which the party or witness is in good faith in attendance.

In the case at bar, it appears that the defendant herein, when served with the notice for the commencement of the action, was in attendance upon the trial of a cause in Howard county, Iowa; that while in said county the sheriff of Mower county, Minnesota, by his direction and express authority, levied a writ of attachment upon the property of the plaintiff herein, this being done on the eleventh day of April, 1882. The wrong complained of was not committed until that day, and the cause of action did not arise until that time, and as the evidence shows that the defendant was on that day sending directions to the sheriff to aid him in seizing the property, it must be held that he was an active participant in the taking of the property, and that he cannot protect himself from responding to the action brought against him, by the alleged owner of the property, under the

privilege usually accorded to witnesses and parties in attendance upon a trial of a cause in court.

There was no claim made, that the mere service of the notice on defendant, requiring him to appear and answer at the September term of the court, the service being made in April, in any manner interfered with the trial of the cause then pending and upon which the defendant herein was then in attendance.

Upon the facts disclosed on the record, we hold that the motion to quash the notice and service thereof must be overruled, and it is so ordered.

See *Larned v. Griffin*, 12 FED. REP. 590; *Matthews v. Puffer*, 10 FED. REP. 606, and note.

### FIELD, Adm'r, v. CHICAGO, B. & Q. RY. CO.

(Circuit Court, D. Iowa. 1882.)

#### 1. HIGHWAY CROSSINGS ON RAILROADS—NEGLIGENCE—PERSONAL INJURIES.

The liability of a railroad company for death or personal injuries caused by the neglect of the company to put up at highway crossings the sign-board to warn travelers along the highway of danger from the proximity of the railroad train, does not attach absolutely under the statute where it appears the damages sustained were the result of the injured party's own negligence, and were not caused by the absence of the sign-board.

#### 2. SAME—STATUTE CONSTRUED—SIGN-BOARDS AT CROSSINGS.

The intention of the statute was not to create an absolute liability on the part of the railroad company, but to make the failure to provide sign-boards at highway crossings conclusive evidence of negligence on the part of the company.

This action is before the court on motion for a new trial on the ground of misdirection to the jury as to the law of the case. Plaintiff's intestate was killed by a moving train while attempting to cross defendant's road with a team at a public crossing. The statute of Iowa, § 1288, requires a sign-board to be set up at public crossings as a warning, and plaintiff claimed that the neglect to set up such sign-board at the highway crossing where the injury occurred made the defendant absolutely liable under the statute, and requested the court to charge the jury to that effect, which the court refused. The question was upon the construction of the statute, which is as follows:



Sec. 1288, Code of Iowa. "Every corporation constructing or operating a railway shall make proper cattle-guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway, good, sufficient, and safe crossings and cattle-guards, and erect at such points, at a sufficient elevation from such highway to admit of free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railway and warn persons of the necessity of looking out for the cars; and any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover, it shall only be necessary for him to prove such neglect and refusal."

William McNett, John A. Shank, and Barcroft & Gatch, for plaintiff.

H. H. Trimble, J. W. Blythe, and Stiles & Lathrop, for defendant.

LOVE, D. J. What is meant by the terms "absolute liability" as here used? They mean a liability created by positive law, free from any conditions whatever. That is absolute which is unconditional. Thus the relation of cause and effect between negligence and the injury is a condition, and the plaintiff's own conduct as to negligence contributing to the injury is a condition. Both of these are at common law conditions to be considered in the right of recovery. But according to the plaintiff's doctrine the statute dispenses with all conditions by creating an absolute liability. Thus, having proved the defendant's negligence, the plaintiff contends that the statute imposes an absolute liability for the injury, even though the sign had nothing to do whatever in causing the injury; and the same result would follow, assuming the fact to be that the plaintiff's own misconduct was an essentially contributing cause, or even the sole cause, of the injury. Supposing, indeed, that the absence of the sign-board had nothing to do in causing the injury, it must have been either entirely fortuitous or the result of the plaintiff's own negligence.

It is a fundamental rule in the interpretation of statutes that the construction must be put upon the whole and not a part of the words of the act or clause. An interpretation which gives no force and effect whatever to some important and significant words in a clause or section must be rejected, in the absence of some conclusive reason for disregarding them as mere surplusage. Now it seems to us that if the plaintiff's construction of section 1288 be correct, the court must entirely reject and disregard the words "sustained by reason of such neglect and refusal," in the clause which provides that "any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such

neglect and refusal." According to the plaintiff's construction the company is liable for *all* damages sustained by the plaintiff, and not merely such damages as are sustained *by reason of* the "neglect or refusal;" in other words, the defendant is liable, according to this theory, for the damages sustained, whether the same result from the defendant's negligence or not. For the plaintiff contends that the statute imposes an "absolute liability," not a liability depending upon any conditions whatever. It is unimportant, in this view, whether the condition of cause and effect between the negligence and the injury exists or not; in other words, it is not a necessary condition that the damages should be sustained *by reason of* the defendant's neglect or refusal. Even though there should be no connection or relation whatever between the want of a proper sign and the accident; nay, more, though the accident should be the direct and sole result of the plaintiff's own negligence,—the defendant must pay the damages, since the statute creates an "absolute liability." This construction, therefore, simply eliminates from the statute the words "all damages sustained *by reason of* such neglect and refusal."

I do not forget that the section further provides that "in order for the injured party to recover it shall only be necessary for him to prove such neglect and refusal." But these words must be construed in connection with those already quoted, and so as to harmonize with them. It is not necessary to put upon these words a construction which would render the words first quoted nugatory. The words last quoted by no means necessarily imply that the defendant's liability shall be absolute and unconditional, thereby making the words first quoted mere surplusage, and cutting off, as counsel contend, all inquiry into the plaintiff's misconduct or negligence.

The words which provide that in order for the injured party to recover it shall "only be necessary for him to *prove* the defendant's neglect or refusal" to erect the sign, relate *ex vi termini* rather to the measure of the plaintiff's proof than to the nature and extent of the defendant's liability. Nothing is said in this section about the defendant's liability being absolute. If it was the purpose of the legislature to make so radical a change in the law, why was it not expressly declared that the defendant's liability should be absolute and the defense of contributory negligence abolished? Why was so important an innovation left to be inferred from a provision as to what it should be necessary for the plaintiff to prove in order to establish his case? The supreme court of Iowa had, before the passage of the statute in question, established the rule that the plaintiff must in case of per-

sonal injury, in order to recover, prove not only the negligence of the defendant, but his own freedom from contributory negligence. This rule has always been considered unjust and illogical by many members of the bar, and I see no reason to doubt that it was the purpose of this legislation, in the provision under discussion, simply to relieve the plaintiff of this unjust double burden. The legislature simply intended to say to the party injured: "It shall only be necessary for you, in order to recover, to prove the negligence of the defendant in failing to comply with the statute; it shall not be necessary for you to go further and prove that you yourself were not in fault."

This construction not only harmonizes the two provisions of the section quoted above, but it is in strict accordance with our common legal parlance. It is not unusual in legal language to say that it is only necessary for the plaintiff, in order to make out his case, to prove so and so, without for a moment intending to imply that the defendant's liability shall thereby be made absolute, and that he shall be precluded from setting up any proper and usual defense. Again, a construction ought, if possible, to be avoided which leads to injustice or absurdity, and to a plain infraction of established principles, since it is unreasonable to suppose that the legislature intended such results. Let us subject the plaintiff's construction to this test. The liability to the injured party cannot be at the same time absolute and conditional. It must be one or the other. If, therefore, the plaintiff's construction is correct, the railway company must be unconditionally liable for the injury suffered by reason of the mere fact of failing to erect the sign. Now, the absence of the sign may or may not cause the injury or even contribute to it. The plaintiff's doctrine is that the statute creates an absolute liability, and therefore it makes no difference whatever whether any relation of cause and effect exists between the negligence and the injury or not. This would seem to be illogical, absurd, and utterly repugnant to established principles of law. Thus a sign, if it existed, could give no warning to a blind man, and yet, according to the plaintiff's view, if a blind man should venture upon the crossing and receive injury, though he should himself be entirely in fault, the company would be liable. Again, if a party in pitch darkness should, without stopping to listen for a coming train or to look out for its lights, rush upon the crossing and suffer injury, the company would be liable by reason of the absence of the sign, although if the sign were present it could not be seen. So, if a man in full view of a coming train and seeing:

his danger should be, against his own will, carried by an ungovernable horse upon the crossing, the company would be liable for the injury to both man and animal because of the absence of the sign. Again, suppose a party should see a train approaching the crossing, he would then have all the warning that a sign could give; yet if he should rashly and of his own negligence venture upon the crossing, taking the chances of escape, the company would be liable for his injuries because of its failure to have up the sign. Thus, if the plaintiff's doctrine of "absolute liability" be sound, might a party recover damages resulting entirely and absolutely from his own fault and negligence. This would be unjust and absurd, as well as clearly repugnant to the provision of the statute that the damages recovered shall be "sustained *by reason* of the neglect or refusal" of the company to erect the sign.

It is said that this absolute liability is founded upon considerations of public policy, and that the legislature so intended it; that the provision was intended to be punitive,—a sort of fine imposed upon the company to compel them to comply with the requirement of the statute. But we have seen that to give the statute this construction it would be necessary to reject or disregard certain express words of the act, and no argument from convenience or policy can justify the court in refusing to give any effect whatever to express words in a statute. Besides, it is difficult to see what sound policy there would be in a law that while inflicting unjust penalty upon one party would encourage negligence in another, by assuring him of damages even resulting from his own carelessness. Sound policy requires that both parties in this class of cases should be put to the exercise of diligence by being made to know that damages may result to them from their failure to exercise reasonable care. If the plaintiff's doctrine be sound, I can see no good reason why a party might not recover for injuries resulting from his own *willful* misconduct in passing a crossing in the face of danger. The plaintiff's counsel admit that there could be no recovery in such case because of the principle that a party can take no advantage from his own wrong. But is not a party's negligence his own wrong as well as his willful misconduct? The difference between negligence and willfulness in a civil action for damages is in the degree only, and not in the essence of the wrongdoing. If, moreover, the statute imposes an absolute liability, and inflicts a sort of fine upon the railway company as a penalty for its non-compliance with the law, and this upon grounds of public

policy, what difference can it make in the question of contributory negligence whether the plaintiff's injury is the result of his mere negligence or his willful misconduct?

Undoubtedly the statute makes the failure on the part of the company to erect the sign conclusive evidence of *negligence*. It is negligence *per se*, and no evidence can be received to remove from the company the imputation of negligence. To this extent the statute changes the common law; but does it follow, in the absence of express words, that the legislature intended to still further change the common law by dispensing with the necessity of all diligence and care on the part of the injured? Was it intended that a plaintiff might willfully and intentionally, or with gross and wanton negligence, precipitate himself in the face of danger, seeing his peril, upon the crossing, and still recover damages for injuries thus received? In other words, was it the intention of the legislature to repeal by mere implication the long-established doctrine of contributory negligence with reference to cases arising under this statute, and give the plaintiff damages caused by his own misconduct? And could it have been the purpose of this legislation to give the plaintiff damages although it should clearly appear that his injuries resulted in nowise from the defendant's negligence in failing to erect the sign, but from some other and wholly different cause? And if the latter question be answered in the affirmative, how are we to reconcile such an answer with the express provision of the statute that the defendant "shall be liable for all damages sustained *by reason of such neglect and refusal*."

It seems to me that if it had been the purpose of the legislature to make such radical changes in the law involving, in many cases, results at once unjust, illogical, and absurd, its purpose would have been made known in express terms, and not left to doubtful inference. The statute makes the mere non-erection of the sign negligence, and prescribes that no other proof shall be required to show negligence. Doubtless it is a presumption under this statute that if the sign were up the plaintiff would take notice of it, and being thus warned would avoid injury. But I see nothing in this to preclude the defendant from showing affirmatively that the plaintiff was guilty of contributory negligence, without which the injury would not have occurred. Suppose, for example, that the defendant could show that the plaintiff saw the train nearing the crossing, and, nevertheless, rashly attempted to cross in the face of impending danger, what good reason

can there be why he should not be permitted to do so? What reason would there be in such case in saying that if the sign had been up he might have been warned by it of the coming train and avoided the danger, seeing that he had before him a more impressive warning of the impending danger than any sign-board could have given.

The precise question before the court has not been decided by the supreme court of Iowa. Every case cited from the Iowa reports might be distinguished from the present by essential circumstances. We have, however, no present purpose to review them, since to give them a critical analysis would extend this opinion beyond all reasonable limits. It is sufficient to say that, rightly understood, the Iowa decisions give such decided countenance to the conclusion at which we have arrived as to leave no doubt that the question will, when directly presented to the supreme court of Iowa, be decided as we have here determined it. *Small v. R. Co.* 50 Iowa, 338; *Lang v. H. C. R. Co.* 49 Iowa, 469; *Dodge v. Burlington & C. R. R. Co.* 34 Iowa, 276; *Spence v. Chicago & N. W. R. Co.* 25 Iowa, 139-142; *Stewart v. Burlington & M. R. Co.* 32 Iowa, 561, 562; *Payne v. Chicago, R. I. & P. R. Co.* 44 Iowa, 236.

The motion for a new trial is overruled.

See *Tucker v. Duncan*, 9 FED. REP. 867; *Thomas v. Delaware, etc.*, R. Co. 8 FED. REP. 729.

## THE CHINESE TAX CASES.

### ON YUEN HAI Co. and others v. Ross and another.

(Circuit Court, D. Oregon. November 22, 1882.)

#### 1. ROAD WORK—LIABILITY FOR—HOW ENFORCED.

A statute of Oregon provides that all male persons between certain ages, "residing" in a road district, shall be listed for road labor on or before April 15th, and be liable to perform two days' work on the roads therein, and if any such person shall fail to do so after being assessed therefor and warned thereto by the supervisor, the latter may deliver a statement of such delinquency to the sheriff, with the amount necessary to discharge it, to-wit, two dollars for each day's work, who shall thereupon collect the same by seizure and sale of the personal property of the delinquent; and if such property cannot be found out of which to make such tax, the sheriff shall demand the amount from any person indebted to such delinquent, and collect the same out of his personal estate, unless he makes oath that he is not indebted to such delinquent; and the sheriff shall receive for his services a sum equal to one-fourth of such delinquent tax, besides his lawful fees, to be paid by the delinquent or collected with the tax.

*Held: Semble*, that a demand for a delinquent tax from a third person is not valid, unless it appears therefrom (1) that the officer had not been able to make the same out of the delinquent's property; (2) that it contained a statement or allegation to the effect that unless the party paid the amount, or made oath that he was not indebted to the delinquent, the officer would proceed to collect the same out of his personal estate; and (3) that it was not for a greater sum than the tax, and one-fourth thereof in addition, as a compensation to the sheriff for making the demand and receiving the money; and no other fees are demandable or chargeable thereon, unless the officer is forced to make the collection by seizure and sale of property, for which he is entitled to the usual fees for such service, in addition to such one-fourth.

## 2. SAME—WHO LIABLE TO PERFORM.

Certain Chinese laborers came to this state to engage in labor upon public works, and on April 1, 1882, were in road district No. 8, in Multnomah county, at work on the construction of a railway from Portland to the Dalles and eastward, where they remained a few months, passing through and beyond the district as the road-bed was completed, without any purpose or occasion to remain longer in the district or ever return there. *Held*, that they were not "residing" in said district on or before April 15th, within the meaning of the statute, so as to be liable to perform road labor therein.

In Equity. Suit for injunction.

*William H. Effinger*, for plaintiffs.

*George W. Yocum*, for defendants.

DEADY, D. J. This suit is brought by a Chinese firm of this city called On Yuen Hai Company, composed of four persons whose names are given in the bill, and 16 other such firms, composed of one or more persons each, to restrain the defendant Sears, as sheriff of Multnomah county, and the defendant Ross, as supervisor of road district No. 8 therein, from collecting from them or the Oregon Railway & Navigation Company, by seizure and sale of their goods and chattels, or otherwise, the sum of four dollars per head, claimed by said defendants to be due from each of 1,449 Chinese laborers in the employ of the plaintiffs as laborers upon the railway of the said Oregon Railway & Navigation Company.

Upon the filing of the bill, by consent of the parties, a preliminary injunction was allowed, and afterwards the cause was heard upon the bill and answer.

The bill is drawn upon the theory that these Chinese laborers were not only not liable to do road work in district No. 8, but that the proceeding taken by the defendants to enforce the payment of a money tax as a substitute therefor is wholly unauthorized by law.

By the laws of this state it is provided that each road supervisor shall, on or before April 15th of each year, "make out, in alphabetical order, a list of all persons liable to perform labor on the public

roads residing within his district," and assess two days' work on such roads to each of such persons. Females, persons under 21 and over 50 years of age, and those who are a public charge or too infirm to labor, are exempt from road work; and any one may pay two dollars to the supervisor in lieu of any such day's work.

If any person subject to road labor as aforesaid shall, after three days' notice from the supervisor, "personally or by writing left at his usual place of abode," neglect or refuse to perform said labor, "such delinquent shall thereby become liable to the supervisor for the amount of this road tax in money; and such supervisor shall proceed at once to collect the same by levy and sale" of his property.

If sufficient property of the delinquent out of which to make the tax cannot be found, the supervisor must proceed against him by action, and the judgment therein may be enforced as for a fine in a criminal action. Or. Laws, pp. 726, 728, §§ 21, 22, 24, 27.

Such was the statute until October 24, 1866, when "An act to facilitate the collection of taxes in certain cases" was passed, which provided as follows:

Section 1. "Any officers charged with the collection of any tax, who cannot find personal property out of which to make the same, shall demand such tax from any person who may be indebted to such tax-payer, and shall collect the same out of his personal estate, unless he shall take and subscribe an oath that he is not indebted to such tax-payer, which oath may be administered by such collector."

Section 2 authorizes the assessor to collect the poll tax at the time of assessing the same, and in default of such payment he is required to give the sheriff a list of such taxes, who must collect the same by the levy and sale of property, or "in the mode directed in the preceding section."

Section 3 provides: "If any person liable to perform labor on the public roads \* \* \* shall fail to do so when warned, \* \* \* the supervisor shall immediately give to the sheriff a statement of such delinquent road work, \* \* \* showing the amount that will discharge the same in money, and the sheriff shall immediately collect the same in the manner aforesaid, and pay it to such supervisor." This section also provides that "the sheriff shall receive for his services," under said sections 2 and 3, "a sum equal to one-fourth part of the delinquent tax, besides his lawful fees, to be paid by the delinquent or collected with the tax." Or. Laws, pp. 769, 770, §§ 101-103.



Upon this hearing the answer is taken for true; and, reading it in the light of the circumstances and the uncontroverted allegations of the bill, the material facts of the case appear to be as follows:

About February, 1882, these Chinese laborers came to Oregon, and were employed upon the railway then being constructed by the Oregon Railway & Navigation Company between Portland and eastern Oregon via the Dalles, under contract with the plaintiffs to that effect, and that they have no fixed residence in the country and expect to return to China at some future day; that road district No. 8 is a political division of Multnomah county, including, as appears from the public records thereof, all that portion of the county which lies to the east of the Sandy river, the west line of the same being about 18 miles east of Portland; that on April 1, 1882, said Chinese laborers were in said district at work upon the construction of said railway, the line of which runs through said district on the south bank of the Columbia river for the distance of about 20 miles, where they remained not to exceed four months thereafter, passing through and beyond the district as the road-bed was completed, without any purpose or occasion to remain longer therein, or to ever return thereto; that while said laborers were in said district, and before April 15th, the defendant Ross, as supervisor of said road district, listed them as persons residing therein, and liable to perform work on the public roads thereof, as Nos. 1, 2, 3, 4, etc., of the company by which they were employed, and did assess against each of them two days' work to be performed upon the roads in said district; that thereafter, and while said Chinese were still in said district, said supervisor did duly notify them by the description aforesaid to work on the roads of said district, which they neglected and refused to do, and being unable to find any property of said Chinese out of which to make said delinquent tax, said supervisor, on July 8th, delivered to the defendant Sears, as sheriff, a statement in writing thereof, with the sum of money which would discharge the same, to-wit, four dollars per head, "not including costs and expenses;" and that thereafter, on August 12th, said sheriff did "garnish" each of the plaintiffs, and the Oregon Railway & Navigation Company, by delivering to each of them true copies of said statement, and "a notice of garnishment," to the effect "that by virtue of a warrant for the collection of road tax issued" by said supervisor to said sheriff, "all debts, property, moneys, rights, dues, or credits of any value" in their hands or under their control, "and especially a certain sum of six dollars belonging to each of the Chinamen" in their employ, designated and numbered as aforesaid, "is hereby levied upon and garnished, and you are hereby required to furnish forthwith a written statement of all such property or credits."

The objection to the proceeding pursued by the defendants for the collection of this tax, that a garnishee process cannot be maintained except in aid of an attachment or execution issued from a court of justice in a judicial proceeding, assumes that this is a technical garnishment, and overlooks the statute (October 24, 1866, *supra*) which expressly authorizes the collection of delinquent road work or tax in the contingency stated—when it cannot be made out of the personal

property of the delinquent—by demanding and receiving the amount of the same from any debtor of the delinquent. The fact that the defendant Sears appears to have erroneously assumed that he was acting under an ordinary garnishment in an action at law does not make the proceeding such an one, or vitiate it, provided the statute governing it is substantially complied with.

The method of collecting or enforcing a tax is altogether within the discretion of the legislature, unless otherwise provided by the constitution. *Cooley, Tax, 36 et seq.*

Assuming, then, that this road labor was duly assessed upon these Chinese laborers, and that they neglected to work it out or pay the equivalent in money after being duly warned thereto, it became the duty of the supervisor to make and deliver to the sheriff a statement of the facts showing their delinquency in this respect, whereupon it became the duty of the sheriff to collect the amount due from each by a seizure and sale of his personal property, and, in default of that, to demand the amount from any debtor of the delinquents, including the plaintiffs. Whether these laborers were duly warned or not, upon the facts stated in the answer, is not free from doubt. But it is alleged in the answer that they were known by the numbers and designation used, and my impression is that it was sufficient.

The allegation in the supervisor's statement concerning the indebtedness of the plaintiffs and the Oregon Railway & Navigation Company to the delinquents, is unauthorized and superfluous. His duty is discharged when he furnishes the sheriff with a statement of the delinquency and the amount which will discharge it.

But the proceeding of the sheriff upon the supervisor's statement seems to have been very irregular, if not illegal. Instead of making a demand upon the plaintiffs for the payment of the delinquent tax, or an oath that they were not indebted to them, accompanied by his own statement that he had not found any personal property out of which to make the same, he seems to have proceeded upon the assumption that he was executing a garnishee process in aid of an attachment or execution in a judicial proceeding, and, without other demand or any statement as to the delinquent's property, served a notice upon the plaintiffs, such as is usual, I suppose, in cases of garnishment, stating that all money, etc., in their hands belonging to the delinquents, and "especially a certain sum of six dollars," were "thereby levied upon and garnished."

Now it is very doubtful if this is a demand at all; and if it should be so construed as for six dollars, I am quite certain that it was an

insufficient and illegal one, for the reasons following: (1) It does not appear therefrom that the sheriff had endeavored and failed to make the amount out of the property of the delinquent, and therefore it does not appear that he was yet authorized to make any demand for it on a third person. It is true that it is alleged in the bill that the delinquents had no property out of which the money could be made. But that is not sufficient. It should have been so stated or alleged in the demand, as a necessary condition to the right to make the same. This demand is a substantial step in an adverse proceeding, whereby a debt due to a delinquent tax-payer is in effect transferred to the sheriff or road district without the consent of either the debtor or creditor. The facts which authorize it to be made, and will justify the debtor in yielding to it and constitute a valid discharge of the debt when paid to the sheriff, ought to appear upon the face of it. If the debtor pays upon an insufficient or unauthorized demand, the debt is not discharged, and he is still liable for it to the tax-payer. (2) It is in excess of the sum due. The amount necessary to discharge the liability of each of these Chinese laborers was four dollars. The statute (Or. Laws, p. 770, § 103) provides that the sheriff shall receive for his services in this respect "one-fourth part of the delinquent tax, besides his lawful fees, to be paid by the delinquent or collected with the tax." If the amount is paid on demand, there can be no "fees" earned, and the compensation of the sheriff is confined to this one-fourth of the tax, which he may include in the demand. He could only earn "fees" after a refusal to pay, in the seizure and sale of personal property, which would be the same, I suppose, by analogy, as for like services upon an execution. This demand, then, should have been for four dollars, and the the one-fourth of that sum for the sheriff's compensation—five dollars in all. The act of October 22, 1864, (Or. Laws, p. 727, § 25,) authorizing the "supervisor," in the collection of a delinquent road tax, to add "20 per cent. thereon" in case the same is not paid until after a levy upon the delinquent's property, has no application to this proceeding by the "sheriff" to collect a tax under the act of October 24, 1866, *supra*; and if it had, it does not authorize the demand or collection of this 20 per cent. until after a levy. But the two penalties of one-fourth and 20 per cent. of the tax are not cumulative. They are given by different acts, which provide for different proceedings under different officers; and, even with the 20 per cent. added to the one-fourth, the amount would be only five dollars and eighty cents, instead of the sum demanded—six dollars.

Besides this, I am strongly of the opinion that a valid demand of a delinquent tax from a third party, on the ground of his indebtedness to the delinquent, should not only show upon its face that the amount could not be made out of the personal property of the latter, but should also contain a statement or allegation to the effect that unless the same was duly paid by such party, or he made his oath that he was not indebted to the delinquent, the amount of tax and penalty, together with the accruing costs or fees, would be collected out of his personal property by seizure and sale thereof. But I will not rest the decision of this case upon the insufficiency of this demand. The question was not argued upon the hearing, the counsel for the plaintiffs having rested his objection to the validity of the proceeding upon the ground that the act of October 24, 1866, *supra*, did not apply to the collection of a road tax at all, and therefore this tax could not be demanded or collected from any creditor of the delinquents except by means of a regular garnishment in aid of an execution issued upon a judgment at law, under the act of October 22, 1864, *supra*, against such delinquents therefor.

Waiving, therefore, the further consideration of the mode of proceeding to enforce the tax, were these Chinese laborers liable to perform road labor in district No. 8 under the circumstances of their presence there? The provisions of the statute upon the subject are somewhat indefinite, but it is evident from what is provided, and from the nature of the case, that persons only transiently in the district are not within its purview or operation. The party must be "residing" within the district, when the "list of persons liable to perform labor on the public roads" is made by the supervisor,—that is, on or before April 15th,—and the notice to labor, if not served on him personally, must be left at his usual place of "abode." The legal definition of the cognate terms, "residence" and "domicile" vary with the circumstances of the case, and the mental constitution of judges and authors. The differences of definition and application of the terms in various circumstances may be seen in Abb. Law Dict. "Reside." Residence generally imports a personal presence, whereas, one may have a domicile in a place from which he is absent most of the time. But residence implies more than a temporary sojourn in a place.

Personal taxes are generally imposed in the place of one's domicile—the place of his fixed habitation, without any present intention of removing therefrom. Story, Conf. Laws, § 43; Whart. Conf. Laws, §§ 74, 80; *Thorndike v. City of Boston*, 1 Metc. 242. But doubtless a person may be a resident elsewhere than at the place of

his domicile for such a length of time and under such circumstances as to be liable to personal taxes there. A citizen of a foreign state, or one of the United States, who comes to Oregon, in the pursuit of business or otherwise, with the intention of remaining here some years and then returning to his home or domicile, becomes a resident of the state, and liable, like other residents, to pay poll and other personal taxes in the county or district in which he may live. But it is not enough that a person is a resident of, or even domiciled in, the state; he must also be a resident of the particular road district in which he is assessed for road labor. To make a person a resident of such a district so as to become liable to do road work therein, in my judgment, he must inhabit the same with the intention of remaining there indefinitely, or at least have resided therein a year. The duty is an annual one,—to be performed once a year,—and this circumstance itself sheds some light upon the relation which the party is presumed to sustain to the locality in which he is expected to work. In effect, the statute provides that certain residents of the road district shall work the roads once a year, and it is but reasonable to conclude, in the absence of anything to the contrary, that the statute contemplates that such residents shall have enjoyed the privilege of at least one year's inhabitancy of the district before the corresponding duty of working the road begins. The road tax upon property in the district is assessed by the assessor at the same time this personal tax is, but not upon the property *then* owned by the resident, but upon that contained in the assessment of the preceding year for state and county purposes.

This construction of the statute makes the provisions for the personal and property tax harmonize, as they should. The latter is levied upon the property of the past year, and the former upon the residence or inhabitancy of the same period. By this means the burden of maintaining the roads of a district is so far equally imposed upon the property and persons therein.

It is not denied that the legislature may provide that every person who is found in a particular road district, on a certain day in the year, shall be liable to do road work therein for that year; and, while it is not probable that any such extreme measure will be resorted to, it would be well to have some practical definition of what constitutes a residence in a district necessary to make one liable to do road work therein.

Attention has not been called to this subject, because, I suppose, as is well understood, only the permanent residents of a district have

usually been required to work the roads; and if these laborers had been European instead of Asiatic foreigners, it is not probable that any one would have thought of attempting to make them work the roads, under these circumstances, as residents of road district No. 8. The statute makes no discrimination in this matter between Chinese and other foreigners, and it is not only contrary to the treaty with China, but to the dictates of natural justice, that any should be made in the administration of it.

My conclusion upon this branch of the case is that these Chinese laborers were never residents of road district No. 8 within the meaning of the statute, but only persons transiently there,—persons passing through the district in the construction of the Oregon Railway & Navigation Company's railway,—and therefore they were never liable to perform road labor therein.

No question has been made as to the right of the plaintiffs to maintain this suit, and I suppose there is no doubt but they may, upon the ground of preventing a multiplicity of suits. 2 High, Injunc. § 1308.

A decree will be entered for a perpetual injunction and costs.

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The expression in a statute, "coming and residing within this state," extends to a person residing in it at the time of the passage of the act. To gain a settlement by the payment of taxes, there must have been an *assessment and payment*; but whether the assessment and payment of a highway tax in labor is a public tax, within the meaning of the statute, *quære*. *Starksboro v Hinesburgh*, 13 Vt. 215. In New York it has been held not the payment of a tax, and no settlement is gained thereby. *Amenia v. Stanford*, 6 Johns. 92. Road taxes assessed against lands are a personal charge upon the owner, and the opportunity to be given to work out such taxes is a condition precedent to collection by legal process. *Miller v. Gorman*, 38 Pa. St. 309. And when assessed against non-residents the tenants in possession have the right to work them out. *Id.* A commutation of a tax may be made when not forbidden by the constitution, but it must not discriminate between classes of individuals, for if it does it is void. *Cooper v. Ash*, 7 Chi. Leg. News, 393. So an assessment of four dollars or two days' work on each male resident between certain ages is a poll tax, and is forbidden by the state constitution. *Hassett v. Walls*, 9 Neb. 387. An assessment for road labor is not a capitation tax, and a city may compel those over 60 years of age to labor, although they are exempt from payment of a capitation tax. *Fox v. Rockford*, 38 Ill. 451. So the commissioners of a town may be authorized to call out the hands, and command personal labor in the repairs of streets, (*State v. Com'rs of Halifax*, 4 Dev. 345;) but the inhabitants are not bound to labor outside of their corporate limits, (*Town of Pleasant v. Kost*, 29 Ill. 490; and see *McBride v. Chicago*, 22 Ill. 573; *Peoria v. Kidder*, 25 Ill. 351.)—[Ed.]

*In re* SOUTH MOUNTAIN CONSOLIDATED MINING Co.

(Circuit Court, D. California. November 8, 1882.)

## 1. MINING CORPORATIONS—STOCKHOLDERS.

There being no *subscribed* stock, stockholders in *mining* corporations, organized under the laws of this state, are not liable, by contract or by operation of law, to pay to the corporation the nominal par value of their stock, even though such nominal value has not been paid in.

## 2. SAME—PURCHASERS OF STOCK—LIABILITY.

Purchasers of stock in such corporations are not, by contract or by operation of law, bound to pay to the corporation the nominal par value of their stock; their only liability is the constitutional and statutory personal liability for their proportion of the debts and liabilities of the corporation, and the liability of their stock to assessment by the corporation.

## 3. SAME—ASSESSMENTS—LIABILITY OF STOCKHOLDER.

The power to levy assessments by the corporation itself is not an asset or trust fund, and it does not pass as such to a court of bankruptcy; nor can such court enforce such liability of a stockholder to assessment by the corporation itself against stockholders of such corporations to discharge the liabilities of an insolvent mining corporation.

## 4. SAME—ACTION TO RECOVER ASSESSMENT.

As to whether a personal action will lie against a stockholder to recover an assessment levied by such corporations, *quære*.

In Bankruptcy. Petition for review.

*Rhodes & Barstow* and *J. B. Crockett*, for petitioners.

*McAllister & Bergin*, *contra*.

SAWYER, C. J. After a careful examination of this case, I have reached the conclusion that the district court was right in its rulings upon the decisive points involved. The views of the district judge are stated in his opinion filed in the case reported in 7 Sawy. 31. I adopt generally those views, and they are so fully and clearly stated that it is unnecessary to further elaborate the reasons given. There can be no doubt that the conclusion reached by the district court with reference to the responsibility of stockholders in ordinary mining corporations, as they have existed in this state, is in accordance with the opinion which has heretofore generally, if not universally, prevailed in the state since the passage of the law relating to corporations—now more than 30 years. To adopt the views maintained by the petitioner, would be to throw upon stockholders in mining corporations liabilities which they never, in fact, expressly contracted, or intended to contract, to assume; or ever supposed they had agreed to assume, even by implication.

The mode of forming mining corporations in this state, and the supposed liabilities assumed, are well known to everybody. They are

in California as much matters of universal knowledge as the principle of natural philosophy that water will seek and, if unobstructed, find its level. A prospector finds, as he supposes, or a party otherwise obtains title to, a valuable mine. It requires capital to work it, which he does not possess. He goes to the money and business centers, where he finds capitalists, or parties who are in communication with capitalists, accustomed to organize corporations for the development of new mines, and makes such arrangements as he can. He presents such evidence of the value of his mine as he has obtained. Little is known of its real value. It may be worth nothing; and it may be worth many millions. Parties are found willing to take hold of the enterprise. They agree to incorporate, fix the capital stock at some purely nominal amount, and divide it into a certain number of shares, corresponding to the amount of capital adopted. The owner of the mine, for an agreed number of these shares, and in consideration of the promise of the other parties to assist in the development of the mine, conveys the mine, and receives for it the amount of stock agreed upon. The other parties, for their services in organizing and managing the company and its business, receive a large portion of the remaining stock, there being usually a considerable amount of the stock reserved by the company, which is put upon the market, and sold for such price as can be obtained, to raise a fund to procure machinery and develop the mine. The price of this stock is, of course, determined by the prospect of the mine, its location, its probable richness, and the confidence of the public reposed in the experience, ability, and character of those having the management. This is the common mode of procedure. But it may be infinitely varied in detail and circumstance. No one, in fact, subscribes for any particular amount of stock, or expressly contracts, or intends to contract, to pay the nominal amount expressed in his certificate of stock, or supposes that he has so contracted, by implication or otherwise. Upon the organization of the corporation, by-laws are adopted, by which the liabilities of the stockholders are extended or limited, so far as admissible under the statute, according to their own views of expediency. This is, however, by contract, and depends upon their own volition. Then there are the limited personal liabilities for the indebtedness of the corporation, thrown upon the stockholders by the constitution and the laws of the state; and the liability to assessment prescribed by the statute, sometimes perhaps modified or enlarged by the articles of association and by-laws. Not only all those who organize these corporations in the mode indicated, and all who purchase the stock, or in any way



deal in it, including those who buy the stock sold to raise a fund to develop the mine, but all who deal with the corporation, fully understand these matters, well knowing what the general understanding and practice is. I apprehend that a purchaser of stock in a mining corporation, with a mere nominal capital of \$10,000,000, in the daily transactions of the stock board in San Francisco, would be very greatly astonished, in case the corporation should turn out to be bankrupt at the time, to find that he had, by his simple purchase, contracted to pay up his share of the \$10,000,000, nominal capital, should that amount be found necessary, in a court of bankruptcy, to discharge the obligations of the corporation. Such a discovery would very soon close out all dealings in mining stocks, in such corporations, as they are now organized.

Mining corporations in California are, in these particulars, *sui generis*. They are organized and carried on upon principles, in these respects, wholly different from banking, railroad, insurance, and like commercial corporations having a *subscribed* capital stock. There is no agreement, express or implied, to pay up any particular amount of stock, and no one understands that there is. Certainly, none is intended by the parties. If there is a contract to pay up the full nominal amount of the stock it could be called in from time to time without regard to the liabilities or needs of the corporation. There being no such agreement, there is no contract or agreement to pay up capital stock which can constitute an asset of the corporation. There is a mere power of assessment for a specific, limited purpose, under the statute and by-laws—not a contract to pay generally in installments upon call; but this mere power to assess, independent of any contract, express or implied, to pay up the nominal amount of capital stock in installments, is not an asset of the corporation, and counsel for the petitioner do not claim that it is. They insist that there is a contract to pay the amount of the capital stock, by implication at least. There being nothing but a power to assess for a specific purpose, that power is not an asset, and it does not pass to the court of bankruptcy as such. The creditor, in my judgment, in this class of corporations, is limited in his remedy to be enforced *in invitum*, to the assets of the corporation, strictly such, and the restricted personal liability of the stockholders under the constitution and laws of the state. See *Foreman v. Bigelow*, 4 Cliff. 508. I am not aware that it has ever been supposed till recently that there was any such remedy in this class of cases as is now sought. Recent decisions of the courts in the eastern states in relation to commercial corporations having a *subscribed* stock,

organized and carried on upon different principles, have suggested to creditors the application of the remedy to mining corporations. So far as my knowledge extends, this is the first instance in this state of any attempt to enforce a remedy which could not have been contemplated by the creditors of this or any other mining corporation when the indebtedness was contracted. Should it succeed, it would, in my judgment, place the liability of all stockholders in the vast number of mining corporations in this state upon a basis entirely different from that upon which they supposed they stood at the time they became stockholders, and different from that prescribed by the constitution and statutes of the state. Such a change should only be effected by express legislative action, and made applicable to the future. For a further discussion of the question see the opinion of the district judge cited. 7 Sawy. 31. I am not prepared to say now that an assessment properly levied by the directors of a corporation, under the statute, may not be collected by a personal action, instead of by a sale of stock. I do not think it is necessary to go so far to sustain the order of the district court, of which a review is now sought, and I therefore express no opinion upon that point either way.

I think the order of the district court should be affirmed. It is so ordered, and the petition for review dismissed.

See S. C. 5 FED. REP. 403

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**MATTHEWS v. SPANGENBERG.**

*(Circuit Court, S. D. New York. December 4, 1882.)*

**PATENT—COMPROMISES WITH INFRINGERS—DAMAGES.**

No price is fixed or royalty established where a patentee, in compromising and settling with those who have infringed his patent, varies his price according to the courage or ability to resist of such infringers, or where there are other circumstances showing the absence of a fixed and established fee

*Briesen & Betts*, for complainants.

*Phillip Hathaway*, for defendant.

WALLACE, C. J. The exceptions to the master's report present the single question whether, upon the proofs, the complainant established any damages to which he is entitled by reason of the defendant's infringement of his patent. To prove damages the complainant relied upon showing the license fee received by him for the use of his

invention. The proofs show five instances in which he received compensation for the violation of his patent, but nothing is shown to fix an established royalty for its use.

In March, 1881, the complainant obtained a decree against one Gee, a manufacturer of structures embodying complainant's invention, in which the damages, profits, and costs of suit were settled by agreement of the parties. Subsequently settlements were made with five other infringers who had purchased their structures of Gee. As the master finds: "In each instance the alleged licensee was an infringer, and with the exception of Dickinson suit had been brought against each of them, and the settlement was not only for future use, but included all past damages and a discontinuance of the suits. In only two instances was there any actual payment to the complainant, and a formal license granted to continue the use of the infringing apparatus. Of the remaining three, two settled by surrendering their infringing apparatus to complainant and purchasing others in place thereof from him, and one simply turned over the infringing machine to complainant in settlement of all past damages." In the two instances where there was an exchange of apparatus with the complainant, the apparatus received by the infringers in the exchange embodied other patented inventions of the complainant besides the one in suit. In the instances where there was a money settlement, different amounts were paid by the infringers; one paying \$200, and the other paying \$250.

It is quite impossible from the proof to ascertain what was estimated as the basis of royalty for future use or as damages for previous use, what was allowed for costs, and what by way of compromise. Everything is left to conjecture and speculation, except the fact that there was a recognition of liability to the complainant for the unlawful use of his invention. The master fixed the complainant's damages at a nominal sum. In this there was no error. As was said by Mr. Justice HUNT in *Black v. Munson*, 14 Blatchf. 268: "No price can be said to be fixed or royalty established where the patentee varies his price according to the courage or ability to resist of the infringer, or where there are other circumstances showing the absence of a fixed and established fee." To the same effect, also, is *Greenleaf v. Yale Lock Manuf'g Co.* 17 Blatchf. 253.

The exceptions are overruled.

## INGALLS and others v. TICE and others.

(Circuit Court, S. D. New York. November 17, 1882.)

## PATENTS FOR INVENTIONS—JURISDICTION—CONTRACT RIGHTS.

Where the validity and use of a patent are admitted, and the rights of the parties depend entirely upon a subsisting contract, the case is not one arising under the patent laws of the United States, and where the requisite diversity of citizenship between the parties does not exist, a circuit court of the United States has no jurisdiction.

*F. H. Angier*, for complainants.

*Kurzman & Yeaman*, for defendants.

WALLACE, C. J. It must be held, upon the authority of *Hartell v. Tilghman*, 99 U. S. 547, that as the defendants admit the validity and use of the complainants' patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention, the case is not one arising under the patent laws of the United States; and the requisite diversity of citizenship between the parties not existing, this court has no jurisdiction. The license under which the defendants are alleged to use the invention, by its express terms, precludes them from contesting the validity of the letters patent, and the controversy which the bill discloses turns wholly on the construction and effect of the agreement of license, and the rights of the parties depend altogether upon common law and equity principles. This conclusion renders it unnecessary to present at length the reasons which lead to the decision of the several other grounds of demurrer taken, but it will suffice, to prevent any misapprehension, to state—

1. I concur with the complainant as to the construction of the condition of the defendants' license, and am of opinion that the patentee had the right to reserve from the operation of the license additional territory; and that, as the patentee, by the terms of her agreement with the complainants, could license no person without their consent, any reservation made by her out of the defendants' territory would inure to the complainants by way of an equitable estoppel.

2. The agreement between the patentee and the complainants did not transfer to the latter the legal title to the patent, and the patentee should therefore have been made a party to the suit.

3. The Dale Tile Manufacturing Company have no community of interest with the other complainants. Their interest in the subject-matter of the controversy is distinct from that of the other complain-

ants, because derived from the patentee by an independent license. The fact that this license was granted by the patentee to the Dale Tile Manufacturing Company with the consent of the other complainants, does not alter the character of the respective interests of the parties in the subject-matter. There is, therefore, a misjoinder of parties complainant.

The demurrer is allowed.

See S. C. *ante*, 297.

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### UNION STONE CO. v. ALLEN and others.\*

*Circuit Court, E. D. Pennsylvania. November 17, 1882.)*

#### 1. PATENTS—IMPROVEMENT UPON FORMER INVENTION—INFRINGEMENT.

An addition, even though an improvement, made to a patented invention, does not confer upon a subsequent patentee the right to use the device described in the former patent.

#### 2. SAME—OIL-STONE HOLDERS.

The patent (No. 102,218) for oil-stone holders is infringed by the patent (No. 224,970,) for hand tools for dressing millstones, even though the latter may be an improvement upon the former by the addition of a bar back of the stone.

In Equity. Hearing on bill, answer, and proofs.

Bill to restrain an alleged infringement of patent No. 102,218, issued April 26, 1870, to Homer Brown, for an improvement in oil-stone holders, assigned to complainant. Respondents denied that complainant's patent possessed any patentable novelty over the well-known joiners' and carpenters' bench vise, and also denied the alleged infringement, and alleged that the device made and sold by respondents was constructed under letters patent No. 224,970, issued February 24, 1880, to William L. Tetters, one of the respondents, for an improvement in hand tools for dressing millstones, which, they claimed, did not include the "pointed feet" described in complainant's patent, and was further distinguished by having a detachable handle and also a solid-metal plate between and in contact with the block and the clamping-rod.

*George E. Betton*, for complainant.

*Joseph P. Gross*, for respondents.

\*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

BUTLER, D. J. Little need be said in disposing of this case. The plaintiff's patent is for an "improvement in oil-stone holders." The presumption of novelty, arising from the letters, is not overcome by anything shown. A comparison of the two holders—plaintiff's and defendant's—leaves no room to doubt that the latter contains the elements of the former. The use for which the defendant's "tool," as he denominates it, is intended, is unimportant, as is also the manner of using it. The plaintiff is entitled to every use to which his invention may be applied. The defendant cannot have the benefit of the plaintiff's holder, even though he may have improved it by the addition of a bar, back of the stone. It would be unprofitable to discuss the law or testimony of the case at greater length.

The plaintiff must have a decree.

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THE S. M. WHIPPLE.

(District Court, D. California. February 11, 1881.)

1. BOATS AND VESSELS—LIEN FOR SUPPLIES.

Under a state law which gives a lien on vessels plying the interior waters of the state for materials and supplies furnished to the vessel, for her use, and on her credit, where such supplies were ordered by the master appointed by the owner, the law confers a lien.

2. SAME—CHARTERED VESSEL—NOTICE TO DEALERS.

Where the owner, who charters a vessel to third parties and under the terms of the charter-party appoints the master for the term of the contract, seeks to displace the lien given by statute for materials and supplies furnished the vessel by setting up a private agreement by which the master was deprived of the authority to create liens on the vessel, he should show by clear proof that explicit and unequivocal notice of the facts was given to persons dealing with the vessel.

*Milton Andros*, for appellant.

*G. M. Williams*, for claimant.

*G. D. Hall* and *W. W. Morrow*, for several intervenors.

HOFFMAN, D. J. It is not denied that the supplies were furnished and the repairs made as set forth in the libel of the libellant and those of the intervenors.

At the time these debts were contracted, the vessel was under charter to *G. A. Carleton* and *J. C. Spencer*. By the terms of the charter *Carleton & Spencer* agreed to pay "all bills for wages, coal, supplies, and wharfage, accruing against the steamer during the period of the

charter, and also all *liens that may have accrued against said vessel since July 14, 1880,*" (they having had possession thereof since that date under a previous charter;) "and further, that they would surrender and deliver the possession of the vessel \* \* \* absolutely free and clear from all liens and incumbrances accruing, etc., between June 14, 1880, and the time of such delivery." It was further agreed that the charterers should employ the pilot and engineer selected by the owner, the wages to be included in the wages to be paid by them," (the charterers,) "and the pilot so selected to be both pilot and captain, and *have charge of the boat.*"

The true and faithful performance by the charterers of the conditions of the charter-party was guarantied by one Charles Jost. The vessel was a domestic vessel, exclusively engaged in the navigation of the interior waters of this state.

By section 813, California Code of Civil Procedure, all steamers, etc., are made liable "(2) for supplies furnished for their use at the request of their respective owners, masters, agents, or consignees; (3) for work done or materials furnished in this state for their construction, repair, or equipment. Demands for these several causes constitute liens upon all steamers," etc.

It is contended by the advocate for the claimant that by the reservation of the right to appoint the master who was to "have charge of the boat," the general owner retained the possession of the vessel, with all the rights and responsibilities of the owner. The supplies were furnished at the request of the master.

The demands of the intervenors, the Phelps Manufacturing Company, J. Boese, and Renton, Holmes & Co., are fully proved. The supplies and materials appear to have been furnished on the credit of the vessel, and without notice of the terms of the charter-party.

With regard to the claim of the Black Diamond Coal Company, an attempt is made to show that the president of the company was notified by Mr. E. V. Joice, agent of the claimant, that the charterers, by the terms of the charter, were to pay for all supplies furnished the vessel, and that neither she nor her owner would be responsible.

Mr. Joice testifies that in June or July, when Carleton & Spencer were running the boat, he informed Mr. Cornwall, the president of the Black Diamond Coal Company, that the boat was to be returned free of charges, and that he must charge the supplies to the charterer. Mr. Cornwall replied that when he supplied a boat he always charged her with the supplies. Mr. Joice then requested him to let him know quietly how much was due, and whether the charterers paid up

promptly. Mr. Cornwall replied that there was nothing due then. Two or three weeks after this conversation, Mr. Cornwall furnished him (Mr. Joice,) with a statement, showing \$200 to be then due for coal. He had but one conversation with Mr. Cornwall—he thinks it was in June, soon after the chartering of the boat; that Cornwall furnished but one statement. Mr. Joice subsequently returned to the stand, to state that on searching his papers he found a second note from Mr. Cornwall, which had escaped his recollection; but he is positive that he also received the first note spoken of by him.

Mr. Cornwall testifies that about the first of September, a few days before the note produced by Mr. Joice was written, he had a conversation with the latter, who inquired how much the charterers owed him. Mr. Cornwall replied that he didn't know, but would send the account to him. Mr. Joice said the boat was chartered, but they had good security. He supposed they (the charterers) would pay their bills, but he didn't want the boat to get too far behind. No notice was given him (Mr. Cornwall) not to trust the boat, but Mr. Joice wanted him to press the parties. Mr. Cornwall states, that this was the first time he knew that the boat was chartered. He did not understand Mr. Joice as giving him notice. If he had, he would at once have given orders not to supply the boat. He further states that his invariable practice is to keep copies of all his correspondence on business matters; that he finds a copy of the second note written by his book-keeper, by his orders, and that he gave him instructions with regard to writing but once. In this he is corroborated by Mr. Scott, his book-keeper. Mr. Scott states that he is positive there was no conversation between Mr. Joice and himself in June or July; that there was only one conversation—the one that directed the note of September 18th, written some 10 days subsequently.

I have no means of determining, as between these two very respectable gentlemen, whose memory has proved treacherous. Intentional misstatement I cannot impute to either. If Mr. Cornwall had not denied so positively that any conversation occurred in June or July, and that any note was written in consequence, I should have surmised that Mr. Joice did not notify Mr. Cornwall as explicitly as he thinks he did, or intended to do; at all events, that Mr. Cornwall did not so understand him. But the conflict is not merely as to the purport of the conversation, but as to its occurrence. Mr. Joice is unable to produce the first note, but Captain Wright, the claimant, testifies that in August Mr. Joice showed him a note stating that the boat was in debt \$200 for coal. On the other hand, Mr. Cornwall



and Mr. Scott are positive that no note of that kind could have been written "without its getting on the letter-book."

Under these circumstances, I must endeavor to arrive at a decision by attempting to estimate the probabilities of the case; and if these afford no reliable guide, and the testimony is found to be equally balanced and irreconcilably conflicting, I must determine against the side on which rests the affirmative of the issue or the burden of proof. It does not appear that the decision of this court in the case of *The Schooner Columbus*, 5 Sawy. 487, was known to any of the parties. In that case it was held that no lien exists under the boats and vessels act of this state in favor of a domestic material man who has supplied a vessel in her home port at the request of the master, after having been notified by the owner that she had been let to the master to be run on shares, and to be manned and victualed by him, and that if supplies be furnished her, it must be exclusively on his personal credit. The point was new, and was in that case first presented to any court in this state. I am not aware whether the decision has met with general approval.

Had it been known to the parties, and accepted as the law, the probability that they would have taken steps to bring themselves within it by notifying the supply-men of the terms of the charter, would be appreciably enhanced.

2. The boat had been long running on the waters of this state. Her owner was well known, and had had dealings with the libellant and the intervenors for a considerable period. To neither of the latter did he give any notice of his contract with the charterers, until at or near the expiration of the last charter. If he or his agent had intended to notify one of the persons with whom he had been dealing, why not extend the notice to all? It seems probable that he would have done so.

3. The owner does not appear to have thought that he had protected himself and his vessel from liability. When executing the last charter, August 18, 1880, (and it was while this charter was running that the greater part of the coal was furnished,) he takes the guaranty of a third party that the vessel shall be delivered free "from all liens accruing between June 14, 1880, (the date of the first charter,) and the completion of the present charter." He seems therefore to have supposed, not only that liens might be created, but that they might already exist.

4. It seems improbable that if Mr. Cornwall had received or understood the notice in question, he would have persisted in furnishing

supplies on the credit of the vessel. In so doing, he would not only be running a great risk as to the payment by the boat or her owner, but would be committing a virtual fraud upon an old customer and acquaintance.

I am disposed to think that these considerations have sufficient weight to show to which side the trembling balance in which the testimony is to be weighed should incline.

But if not, then the case must be decided by applying the rule that he on whom it rests to establish a certain state of facts, must do so by a preponderance of proofs. The rule is peculiarly applicable in this case. The supplies were furnished to the vessel for her use and on her credit. They were ordered by the master appointed by the owner. In such cases the law of this state confers a lien. He who would displace it by setting up a private agreement between himself and a third party, by which the master was deprived of the authority to create liens on the vessel, should show by clear proofs that explicit and unequivocal notice of the facts was given to persons dealing with the boat; and especially to those who had for a long time previously been in the habit of supplying her on her credit and that of her owners. It cannot be said that clear proofs of such a notice have been furnished in this case. It may be added that by this decision no practical injustice is done.

If the security taken by the owner is adequate, it is more equitable to compel him to look to it for his indemnity, than to deprive the supply-men of all remedy except a fruitless suit *in personam* against insolvent charterers.

A decree must be entered for the amounts claimed in the libels, with the deductions admitted at the hearing.

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### THE MENDOTA.\*

(District Court, S. D. New York. October 5 and 23, 1882.)

#### 1. LIMITATION OF LIABILITY—VESSEL—POSSESSION OF SHERIFF UNDER ATTACHMENT—SURRENDER TO TRUSTEE.

In an action begun in a state court against the owners of a vessel, an attachment against the property of some of them as non-residents was issued, and their shares in the vessel were attached by the sheriff. The cause was then removed by the defendants to the United States circuit court. The owners then began proceedings in the United States district court to limit their liability under

\*Reported by R. D. & Wyllys Benedict

Rev. St. §§ 4283-4285, and took the steps required by law to transfer the vessel and freight to a trustee appointed by the district court, and to stay all proceedings and suits against them; but the vessel remained in the possession of the sheriff. On a motion by the owners for an order directing the defendants in the limited-liability proceedings, who were plaintiffs in the state-court suit, to order the sheriff to surrender the vessel to the trustee, *held*, that the possession of the vessel by the marshal or trustee is not necessary for the purposes of limited-liability proceedings, where the court has acquired jurisdiction to grant the relief prayed for; and that the direction asked for was unnecessary and improper at such a stage of the proceedings.

2. SAME—SALE OF PROPERTY TO PREVENT DESTRUCTION.

Thereafter, the trustee, by petition, showed the court that the vessel, if compelled to remain in custody until the termination of the litigation, was likely to be eaten up by custody fees, and her value greatly impaired, if not substantially destroyed, and asked to be allowed to sell the vessel free from any claim of the attaching creditors; the attachment to be transferred to the proceeds of the sale, and to that end that the attaching creditors be directed to co-operate in effecting the sale by surrender of the vessel to him. *Held*, that the court had the power to direct the sale proposed; that such a sale, if made at that time, would produce no injury to the rights of the defendants, and require no present determination of questions that should be determined at final hearing; and *held*, that in this case a sale was necessary to preserve the property from destruction, and the application of the trustee must be granted.

On May 31, 1882, an action was begun in the New York supreme court, the county of New York being designated as the place of trial, by Messrs. Watjen, Toel & Co., of the city of New York, against the owners of the bark Mendota, to recover \$14,892.57 on the following state of facts:

The plaintiffs alleged that in December, 1881, they opened a credit in London with J. Henry Schroeder & Co., bankers, in favor of Alejandro Maderna & Co., merchants at Buenos Ayres and Montevideo, to the extent of £50,000, available against shipments of wool to be made to the plaintiffs at New York, and Schroeder & Co. engaged to accept drafts drawn on them by Maderna & Co. on presentation with bills of lading; that in February, 1882, Maderna & Co. shipped on the Mendota at Montevideo 208 bales of wool, whereupon the master of the bark, at the request of Maderna & Co., signed bills of lading whereby it appeared that 290 bales had been shipped; that upon receiving the bills of lading Maderna & Co. drew under the said credit upon Schroeder & Co. for £10,000, and sold the bill of exchange and bills of lading to the London & River Plate Bank, (Limited;) that Maderna & Co. did not ship the 82 bales, and soon after failed in business and became irresponsible, and that the plaintiffs, in order to procure the shipment of the 82 bales mentioned in the bill of lading which had not been shipped, satisfied the vendor's lien on them and

paid other charges, amounting in all to the amount sued for, and the 82 bales were thereupon shipped and brought to New York and delivered to the plaintiffs; that the bill of exchange was negotiated by Maderna & Co., as stated, and afterwards paid by Schroeder & Co., who were reimbursed by the plaintiffs.

Upon an affidavit containing substantially the above allegations, an attachment was issued to the sheriff of Kings county against the property of the defendants, as non-residents, and the bark Mendota was attached, with the exception of the interest of one of the owners of the vessel, E. A. Houghton, who was a resident of the state of New York. The attachment was afterwards set aside as to the interest of A. A. Whittemore, the master of the bark, he also being a resident of New York state.

On the twenty-first of July the defendants removed the cause to the United States circuit court for the southern district of New York, the plaintiffs being citizens of a foreign state.

Thereupon the owners of the bark began proceedings in the United States district court for the southern district of New York, for the limitation of their liability as such owners, under sections 4283, 4284, and 4285 of the Revised Statutes.

Samuel H. Lyman was appointed trustee in those proceedings, and the owners thereupon paid into his hands the pending freight, and executed a bill of sale of the vessel to him. Upon a certificate to that effect made by the trustee, the court made an order that a monition issue against the firm of Watjen, Toel & Co., and the firm of G. Amsinck & Co., who also had a similar claim, as to which the owners of the vessel sought to limit their liability; and the court also made an order restraining the prosecution of all suits against the owners in respect to any such claims, and especially the suit begun in the state court by Watjen, Toel & Co.

An order was also made that Watjen, Toel & Co. show cause why they should not direct the sheriff to surrender the vessel to the trustee. This motion was not argued until the fourth of October, owing to the illness of Judge Brown, and then it was heard by BENEDICT, D. J., sitting in the southern district, and during this time the vessel remained in the possession of the sheriff.

The following is the opinion on that motion.

*Benedict, Taft & Benedict*, for the owners of the Mendota and for the trustees.

*Jas. K. Hill, Wing & Shoudy*, for respondents.

BENEDICT, D. J. The libelants' motion for an order directing the defendants to surrender to the trustee appointed herein the libelants' vessel, the bark Mendota, now held by the sheriff of Kings county by virtue of an attachment against the property of the libelants, procured to be issued in an action brought by the defendants against these libelants in a state court, cannot be granted unless this court is prepared to determine in a summary manner, upon a motion, that the liability sought to be enforced by the defendant in the action in the state court is one from which the libelants can be freed by means of this proceeding, and is also prepared in like manner to determine that the institution of this proceeding has the legal effect to terminate finally the action in the state court, and deprive the sheriff of all right to detain the vessel. These two questions are, so far as known, new, and they are of importance. I am unable to see any necessity for their determination in the method proposed. This court, by the appearance of the defendants, the assignment of the libelants' interest in the vessel to the trustee appointed by this court, and the possession of the freight by such trustee, has acquired jurisdiction to grant the relief prayed for by the libelants. The possession of the vessel by the marshal or the trustee is not necessary for the purposes of such a proceeding. The suit can proceed to a hearing under such circumstances as well with the vessel in the possession of the sheriff as with the marshal in possession. When, at such a hearing, the libelants shall have established their right to the relief prayed for, and shall have procured a formal judgment that the action in the state court no longer exists, then it may be proper to insert in the decree a direction that the vessel be surrendered by the defendants to the trustee. At the present time such a direction appears to me to be unnecessary and improper.

The motion is accordingly denied.

An application was thereafter made by the trustee for leave to sell the vessel. The grounds of this application sufficiently appear in the following opinion:

BENEDICT, D. J. In this proceeding, which is instituted by the libelants for the purpose of obtaining a limitation of their liability as owners of the bark Mendota, the trustee appointed by the court now applies to this court to direct that the vessel be sold as perishable. The situation of the vessel is as follows: On the twenty-second day

of July, 1882, the libel was filed, and a monition issued to the marshal to cite and admonish the above-named defendants to appear and answer herein. Thereafter a trustee was appointed by this court, in pursuance of the statute and the general admiralty rules, to whom the libelants transferred all their interest in the vessel and her freight. The trustee obtained possession of the freight, and the defendants have appeared in the action, but the vessel has been withheld from the trustee's possession by the sheriff of the county of Kings, by virtue of an attachment procured to be issued by the above-named defendants in an action at law commenced in a state court, which action has since been removed to the circuit court of this district.

The action at law, instituted by these attaching creditors, is to enforce against the libelants, in this proceeding, a liability from which relief is sought by means of this proceeding, and all further proceedings in that action have been stayed by the order of this court, issued as required by general admiralty rule No. 54.

The attaching creditors, having been made parties defendant in this proceeding and appeared therein, contest the right of the libelants to a limitation of their liability, and claim to be entitled to be allowed to proceed to collect their demand by means of their action at law. The questions which are thus presented to this court are novel, and are likely to involve protracted litigation in this and the appellate courts. The vessel has already been detained since July last in the custody of the sheriff, and, if compelled to remain in custody until the termination of the litigation, is likely to be eaten up by custody fees and her value greatly impaired, if not substantially destroyed. To avoid this destruction of property, the trustee appointed in this proceeding now applies to this court, by petition, for an order directing that the vessel be sold by him, free from any claim of the attaching creditors by virtue of their attachment, and that their claim under that attachment be transferred to the proceeds of such sale, and, to that end, that the attaching creditors be directed to surrender the vessel to the trustee. This petition is one that, in my opinion, should be granted, for the following reasons:

Inasmuch as all further proceedings in the action at law have been stayed, as required by law, no sale of the vessel can be effected by any order in that action. If, therefore, the vessel is to be saved, it must be by some order of this court. The question, then, is whether this court has power to grant such an order as is here prayed for. The attaching creditors, it will be observed, are parties defend-

ant in this proceeding, and having appeared therein, and a transfer of the vessel to a trustee appointed by this court having been duly made, and the trustee having acquired possession of the freight, the jurisdiction of the court to grant the relief prayed for in the libel is complete, whether the proceeding is considered to be a proceeding *in rem* or *in personam*, or both. The possession of the vessel is not necessary to give jurisdiction in cases of this description; as, for instance, where the vessel has been sunk in the sea.

Having acquired jurisdiction of the attaching creditors by their appearance in this proceeding, the court has power, by its final decree, to declare the liability of the libelants to these creditors to be limited to the value of the vessel and her freight; and, also, to direct these creditors, parties defendant, to relinquish their attachment and surrender the vessel to the trustee, in order that she be converted into money, and her value distributed, as required by the statute.

If such may be the final decree of this court, the power to make the order prayed for cannot be denied. The greater includes the less. The question controlling here, therefore, is whether the power to make the order prayed for can be properly exercised at this stage of the controversy. Having the power, it must be the duty of the court to exercise it in a case like this, where a failure so to do will result in the destruction of the vessel, and so render vain not only this proceeding, but the action at law as well; provided no substantial right of the attaching creditors will be affected thereby. It has been impossible for the attaching creditors to point out how injury can come to them by such a sale as proposed. If the vessel be sold in the manner proposed, it will still be open to the attaching creditors to dispute at the final hearing the right of the libelants to a limitation of their liability, and also to assert their right to the proceeds of the vessel by virtue of the attachment, for the proceeds of the sale are to be held subject to any right acquired under the attachment; and neither of these questions is now passed on. The money realized by such a sale will be under the direct control of this court, and therefore available to the attaching creditors in case they succeed in their contention here. No prejudice to the action at law will result by reason of such sale, for, the libelants having appeared in that action, jurisdiction will not be lost by the sale of the vessel, and that action can proceed to judgment, if, by final decree herein, it is determined that the libelants are not entitled to be relieved from the liability sought to be enforced there; and in that event, the proceeds of the vessel can, if desired, be transferred to the credit of the action at law.

Clearly, the order sought not only will not injure the attaching creditors, but will benefit them by preserving for them, it may be, property which otherwise will be destroyed.

It has been said that the statute confers no power upon this court to direct such a sale, nor does it, in express terms. But such power is to be implied, because necessary to the exercise of powers that are expressed. The supreme court of the United States, sitting in admiralty, found in the statute power to restrain the further proceeding of suits against the ship-owner, and the power to stay such proceedings must include the power to save from destruction property which otherwise the stay will destroy. The power to sell the ship rests upon the same ground as the power to protect the owner from suits, namely, the necessity of the case.

Again, it has been said, the order asked for will deprive the sheriff of his possession. But the sheriff's possession is the possession of the attaching creditors for the sake of the attachment, and this attachment is saved by the order proposed. Again, it is said, the trustee should be left to acquire possession of the vessel by means of an action at law in the nature of replevin. To such a course there may be many objections, and it is quite certain that the institution of such a suit would not be likely to save the vessel from the destruction that threatens her. I find, therefore, the existence in this court of the power to direct the sale proposed; that such a sale, if made at this time, will produce no injury to the rights of the defendants, and require no present determination of questions that should be determined at final hearing; and I also find that such a sale is necessary to preserve the property from destruction.

What has been said is sufficient, I think, to show that the present application is substantially different from any of the former applications, and that it cannot be with propriety denied. And I add that it is quite evident that if the result sought to be obtained by means of this application cannot be attained in proceedings of this character, an easy way is offered to render null the statute which the libelants invoke.

The application is accordingly granted. Let the order be settled on notice.



## THE CITY OF MILWAUKEE.

*(District Court, E. D. New York. November 24, 1882.)*

## 1. COLLISION ON ERIE CANAL—CANAL-BOAT TIED UP.

It is the duty of a canal-boat, which ties up in a canal in a fog, to select the berme bank; and the burden is upon a boat which ties up on the tow-path side to show that she took sufficient precautions to warn an approaching boat, either by strong light or by timely hails.

## 2. PRECAUTIONS OMITTED—APPROACHING STEAM CANAL-BOAT.

Where the first of these precautions was omitted, and the evidence as to the other precaution was contradictory and open to suspicion, and did not show that timely and sufficient hails had been given by a canal-boat tied up on the tow-path side of the Erie canal to an approaching steam canal-boat, *held*, that the libel against the steam canal-boat for damages for the collision which occurred must be dismissed.

*L. R. Stegman*, (with whom was *E. G. Davis*), for libellant.  
*Beebe, Wilcox & Hobbs*, for claimant.

BENEDICT, D. J. This action is to recover damages caused by a collision between the canal-boat *Frank Noble* and the steam canal-boat *City of Milwaukee*, that occurred on the Erie canal, about a mile west from Canajoharie, between 4 and 5 o'clock in the morning of the ninth of October, 1880. The libel avers that the *Frank Noble*, while lying stern to the west tied up on the tow-path side of the canal,—the morning being somewhat foggy,—was run into by the *City of Milwaukee*, bound east; that the *Frank Noble* at the time had a watch on deck, who, as the *City of Milwaukee* approached, hailed her twice to give her notice of a boat on the tow-path, and when she was about 90 feet distant shouted to her to take the outside; that the *City of Milwaukee* disregarded such hails and came directly upon the *Frank Noble*, striking her on the stern, two feet from the rudder post on the port side. The libel also avers that the bow lamp of the *Frank Noble* was burning at the time, and that a strong light was cast astern from a lamp in her cabin hatch, and the *Frank Noble* was easily to be seen at a considerable distance. The faults charged on the *City of Milwaukee* are failure to pay attention to the hails from the *Frank Noble*, and keeping up her full speed on a foggy morning. The answer admits the collision at the time and place stated in the libel, and avers that the morning was so foggy as to render great caution necessary. It denies that any warning was given to the *City of Milwaukee* as she approached the *Frank Noble*. It charges that the

\*Reported by R. D. & Wyllys Benedict.

Frank Noble was in an improper place, and an obstruction to navigation; that the City of Milwaukee was proceeding very slowly, with just sufficient headway for steerage way, and close in to the tow-path side; that the Frank Noble had no lights nor lookout, and gave no warning, and her presence on the tow-path was not known to those on the City of Milwaukee until so near that it was not possible for them to avoid her.

Upon the facts it is first to be remarked that the Frank Noble was tied up in an improper place. When she found the fog too thick to run with safety it was her right to tie up, but it was her duty to select the berme bank for that purpose. If, as she claims, at the place where she stopped it was not possible to tie to the berme bank, it was her duty to select another place, either by proceeding a short distance further or by stopping a few moments sooner than she did. Having tied up at an improper and dangerous place, the burden is upon her to show precautions taken sufficient to warn a boat approaching from the west in time to enable such boat to avoid her. Two such precautions were at her command—a strong light showing astern and timely hails. The first of these precautions she omitted. Her bow light and the light from her cabin were not sufficient in such a fog to give warning to a vessel approaching from the west. But she says that she did give timely and sufficient hails to the City of Milwaukee to enable that boat to avoid her. The evidence upon this point on the part of the libelant consists of the testimony of a single witness,—the steersman of the Frank Noble, who was the only person on deck. In corroboration of the statement of this witness that he loudly hailed the Milwaukee, testimony has been given by him, and also by the captain of the Frank Noble, and, on the other hand, by the captain and the steersman of the City of Milwaukee, as to what was said on the respective boats when they passed each other immediately after the collision. No two of these witnesses agree as to what was then said, and all are equally credible. But the uncontradicted evidence that subsequent to the collision the steersman of the Frank Noble offered the steersman of the City of Milwaukee \$50 to swear that the Frank Noble had a light, indicates that there was little expectation of securing credence for the statement that the City of Milwaukee was properly hailed. Upon such testimony I am unwilling to hold that timely and sufficient hails are proven to have been given to the City of Milwaukee.

The result is that the libel must be dismissed.

## THE MARYLAND.\*

(District Court, E. D. Pennsylvania. November 14, 1882.)

**ADMIRALTY—COLLISION BETWEEN VESSEL IN MOTION AND VESSEL AT HER MOORINGS—LIBEL AGAINST SEVERAL VESSELS—BURDEN OF PROOF.**

Where a barge sinks two days after an alleged collision with a ship in motion, while the barge was at her moorings, and where at the time of the alleged collision no complaint was made and but slight injury discovered, and the weather was such, with the river packed with ice, that the injury might have resulted from the grinding and pounding of the ice, the burden of proof rests upon the barge, in an action against the ship and her tows, to show that the injury resulted from their negligence.

Libel by the owners of the barge *George Twibell* against the ship *Maryland* and the steam-tugs *New Castle* and *Yorke*.

The libelants claimed that while the *Twibell* was properly moored at the wharf adjoining Point Breeze gas-works, in the river Delaware, on December 27, 1880, she was struck by the ship *Maryland*, by reason of the negligence of the ship or that of her tugs,—the *New Castle*, which had parted an inferior hawser, and the *Yorke*, which had left the ship for the purpose of opening a channel through the ice. The *New Castle* claimed that the hawser furnished by the *Maryland* was of sound and sufficient appearance, and was not submitted for the approval of the *New Castle*. The *Yorke* claimed that her employment in opening a channel through the ice was the full performance of her engagement and duty. The *Maryland* denied that any collision had occurred, and produced evidence that at the time no injury was complained of, and none discovered, beyond a slight bruise upon the fender of the *Twibell*, insufficient to account for the sinking; and that the bruise might have been caused by the jamming of the ice while the *Maryland* was passing. It appeared that the *Twibell* did not sink until the following night, and, the river being full of floating ice, the grinding and pounding against the *Twibell* were sufficient to have caused her to sink.

*Theodore M. Etting* and *Henry R. Edmunds*, for libelants.

*H. G. Ward*, for the *New Castle*.

*J. W. Coulston*, for the *Yorke*.

*Curtis Tilton* and *Henry Flanders*, for the *Maryland*.

BUTLER, D. J. The positive testimony respecting the collision is in direct conflict, and the inferences arising from surrounding circumstances may be invoked with as much force, at least, by the respond-

\*Reported by Albert B. Guilbert, of the Philadelphia bar.

ents as by the libelant. While this point is thus left in doubt, the question of *injury* (supposing collision to have occurred) is left in equal if not in greater doubt. That the libelant was disturbed, in her position by the wharf, may be conceded. The river was full of ice, and the passage of a vessel in that vicinity would be likely to disturb her by disturbing it. Coming near, as the *Maryland* did, it is highly probable the ice was jammed against her, and this may have produced all the disturbance seen by libelant's witnesses. That she was struck by the *Maryland* with force sufficient to break her fastenings, drive her through the ice 60 to 80 feet, and not only to stop the *Maryland's* forward motion, but to produce a recoil of several feet, as alleged by the libelant and sworn to by his most important witness, is wholly incredible. Such a blow, on her square stern, would certainly have cut her down instantly. The only evidence of *injury* is the inference from sinking two days later. Examination at the time disclosed no injury. The bruise on her fender (if recent) was immaterial. The respondents were allowed to go on their way without complaint, and if the barge had not subsequently gone down no suggestion of injury (it is reasonable to infer) would ever have been made. To conclude that she went down in consequence of injuries received at the time, would not be justifiable. From Monday, about noon, when the blow is said to have been given, until Tuesday night, when she sank, no injury, or indication of injury, was discoverable. The river during all this time was full of floating ice, which was grinding and pounding against the boat. That she went down from this cause is, to say the least, quite as probable as that she sank from the alleged blow of two days before. Sufficient has been said to indicate the reasons for believing that the libelant's case is not made out. He may have been injured, as he alleges, but with the burden of proof on him he has not succeeded in showing it.

The libel must be dismissed.

## WOLFF and others v. ARCHIBALD.

*(Circuit Court, D. Minnesota. December Term, 1882.)*

## 1. REMOVAL OF CAUSE—PETITION.

The allegations of the petition for removal are jurisdictional, and they must be positive and certain; and the allegation that the defendant is an alien, "as plaintiff is informed and verily believes," is insufficient.

## 2. SAME—CITIZENSHIP.

Children of citizens of the United States who are born in foreign countries are citizens of the United States.

## 3. SAME—JURISDICTION—REMANDING CAUSE.

In all cases where there is doubt as to the jurisdiction, in a cause removed, the safer practice is to remand the cause to the state court.

## Motion to Remand.

*Brown & Cheu*, for plaintiff.

*A. E. Bowe and Geo. N. Baxter*, for defendant.

MCCRARY, C. J., (*orally*.) We have considered the motion to remand. This cause was removed here by the plaintiff on the ground that the defendant is an alien. The allegation of the petition for removal is that the defendant is an alien, as plaintiff is informed and verily believes. This, we think, is insufficient; the allegations of the petition for removal are jurisdictional, and they must be positive and certain, because the court cannot well proceed to take jurisdiction of a case and try the same as long as there is any doubt upon the question of jurisdiction, and it has, we think, been held that a petition for removal in this form is not good. Besides, it appears by the affidavits filed here that, to say the least, it is a question of grave doubt whether the defendant is an alien or not. His father was a native-born citizen of the United States, born in the state of Vermont. He removed to Canada and spent some of his time in Canada, and the remainder in the United States, and it seems he was sometimes on one side of the line and sometimes on the other. This defendant was born in Canada, and came with his father to this country before he reached his majority. The law is that children of citizens of the United States, who are born in foreign countries, are citizens of the United States. We think it is probable that this defendant is a citizen of the United States. That is so unless the father became a citizen of Great Britain. Of that there is no proof, and it is, to say the least, doubtful. In all cases where there

is doubt in a case of removal as to the jurisdiction of this court, it is safer to remand, because there is no doubt about the jurisdiction of the state court.

The motion to remand is sustained.

### SUTRO and others v. SIMPSON and others.\*

(Circuit Court, D. Colorado. November 14, 1882.)

#### 1. SUIT BY NON-RESIDENT—BOND FOR COSTS.

Under the statutes of Colorado, a suit brought by a non-resident of the state must, on motion by defendant in apt time, be dismissed, unless bond for costs was executed and filed at the time of the commencement of the suit. To execute the bond two days after the action is instituted will not avail.

#### 2. SAME—REMOVAL TO FEDERAL COURT.

Though no bond for costs is required in case of suit originally brought in the United States court, yet when a cause is removed from the state court to the federal court, the latter begins where the former left off; and motion to dismiss for want of bond for costs having been entered in the state court, and pending at the time of removal, will be heard in the federal court, and determined in accordance with the law applicable to the motion when made.

On Motion to Dismiss.

*Sleeth & Liddell*, for plaintiffs.

*M. J. Waldheimer*, for defendants.

HALLETT, D. J. This action was brought in the district court of Arapahoe county, on the twenty-seventh day of May last, to recover the sum of \$4,500. Concurrently with the summons, plaintiffs took out a writ of attachment, which was levied on defendants' goods, and, together with the summons, was served on defendants on that day. It is conceded that plaintiffs then were, and still are, citizens and residents of the state of New York, and that at the time of bringing the suit no bond for costs was filed, as required by chapter 20 of the Revised Statutes of the state. Two days later, and on the twenty-ninth day of the same month, such a bond was filed and approved by the clerk, and on the same day, but whether before or after the filing of the cost bond is not shown, defendants entered a motion to dismiss for want of a bond. On the first of June following, the cause was removed into this court on plaintiffs' petition, setting up the necessary facts as to the citizenship of the parties; and defendants, not having otherwise appeared, now urge their motion before the court.

Numerous cases are cited from the reports of this state and from

\*From the Colorado Law Reporter.

the state of Illinois, in which a similar statute was in force for some time, to the effect that the statute is imperative and must be observed. *Talpey v. Doane*, 2 Colo. 298; *Filley v. Cady*, 3 Colo. 221; *Hickman v. Haines*, 5 Gilman, 20.

The language of the act cannot be misinterpreted. After providing in the first section that security shall be given in a form which is prescribed, the first clause of the second section is as follows: "If any such action shall be commenced without filing such instrument of writing, the court, on motion, shall dismiss the same, and the attorney for the plaintiff shall pay all costs accruing thereon."

The statute of Indiana, which was interpreted in *Cox v. Hunt*, 1 Blackf. 146, contained no such direction. In the absence of such provision it may be reasonable to say that the defendant should be satisfied with security given when it is demanded. With such a provision in the law, it must be apparent that nothing short of absolute denial of the authority of the legislature can prevail against it. Nor is the bond for costs under a statute of this kind an element of jurisdiction. By failing to object in apt time the defendant may waive it, and the court will have authority to proceed without it. *People v. Cloud*, 50 Ill. 439.

But the power of the court to proceed in a case where no objection is raised by defendant is not the matter in issue. That question is, whether, upon motion made in due time by defendant, the statute shall be enforced; and upon that there is no room for debate.

It is contended, however, that the motion to dismiss cannot be maintained in this court, inasmuch as the act of congress of 1875 declares that the action shall stand in this court as if originally brought therein; and no bond for costs is required of non-residents or others in suits brought in this court. The language of section 3 of the act of 1875 on that subject is as follows: "And the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

It would be most extraordinary to regard this clause as depriving either party of any substantial right which could have been asserted in the state court, if the cause had remained in that court. In a case of defective service of process, and after removal by plaintiff, it will hardly be claimed that the defendant will be precluded from objecting to the service by the requirement that "the cause shall proceed." Obviously the intent of the statute is to confer on the circuit court, in respect to such cases, as full and ample authority as is held in

cases brought in that court. But this is not saying that a question which properly arose in the state court before the removal of the cause, and which remains undetermined, shall not be considered in the circuit court.

The manner of bringing the suit, and its progress while it remained in the state court, was subject to the law of the state, which may be administered here as well as in the state court. And the circumstance that the question could not have been raised in this court, if the suit had been brought here, is of no importance. The paragraph cited from the act of 1875 is jurisdictional to the court, and not a limitation of the rights of parties.

In the supreme court and in this court it has been held that in a cause removed from a state court to a federal court, the latter begins where the former leaves off. *Duncan v. Gegan*, 101 U. S. 810; *Brooks v. Farwell*, 2 McGrary, 220; [S. C. 4 FED. REP. 166.]

We take the cause as we find it. Whatever has been determined in the state court is accepted in the circuit court as conclusively settled, subject to the jurisdiction of the supreme court to review it on writ of error or appeal. Whatever remains undetermined at the time of the removal is to be decided in the circuit court according to our own modes of proceeding, but with full recognition of all substantial rights. The motion to dismiss was filed in the district court of the state in due time, and by the removal of the cause into this court the plaintiffs could not defeat either the right to have the motion heard, or the effect of it when it should be heard. If defendants had made the application to remove, perhaps the aspect of the case would be different; not because of any obstacle to the motion in this court, but the application to remove as an appearance by defendants, and a step taken in the cause, might have been regarded as a waiver of the objection respecting the cost bond. But that view is not presented by the record. Plaintiffs brought the case here voluntarily, and defendants have not in any way changed the attitude assumed by them in the district court of the state. The bond filed two days after the suit was brought, without leave of the court, was not in compliance with the statute. It will be observed that the language of the act refers to the commencement of the suit as the time for filing the bond for costs; and it is in terms declared that if the suit shall be commenced without filing the bond, it shall be dismissed. However hard the law may appear to be, the remedy is with the legislature, and not in the courts. The suit will be dismissed at the cost of the plaintiffs' attorneys.



## NEW ORLEANS, M. &amp; C. R. Co. v. CITY OF NEW ORLEANS.\*

(Circuit Court, D. Louisiana. June, 1878.)

## 1. ADJUDICATION—HOW DETERMINED.

In determining what has been adjudged courts will regard the decree, and in case of ambiguity, but not otherwise, be governed by an accompanying opinion.

## 2. INJUNCTION—RES ADJUDICATA.

An injunction having been issued by a state court and perpetuated by the decree of the supreme court of the state, a similar injunction granted as between the same parties, with regard to the same subject-matter, in a new suit, by a court of the same state and removed to this court, the matter will be treated by this court as a thing adjudged, and the injunction perpetuated.

## In Equity.

*John A. Campbell* and *A. Micou*, for complainants.

*B. Frank Jonas*, City Atty., and *W. W. King*, for defendant.

*BILLINGS*, D. J. This is a cause which was commenced in the "superior district court" of the parish of Orleans, and has been removed from that court to this. In this court, from its nature, it stands as a chancery suit.

Plaintiff alleges that in the year 1874 the city authorities (the defendants) sent a large force to beat down the walls of a freight depot belonging to this defendant company. As an incident of the suit, the complainants obtained an injunction in the "superior district court," *pendente lite*, and the object of this suit is to perpetuate that injunction. The mischief is of such a character as to make the case fall within that class of cases which justifies the interposition of the courts of chancery.

The basis of the suit as set up in the petition of the complainant—now to be treated as a bill in equity—is a judgment of the supreme court of the state of Louisiana between the same parties contained in the record—No. 3,692 of that court.

On the other hand, the defendants set up a final decree rendered in the supreme court of the state of Louisiana, also between the same parties, known as No. 3,701 of the docket of said court.

An inspection of the record in this case discloses the fact that the complainants had, partly by purchase from private owners and partly by a grant of the legislature, obtained two sets of rights with reference to certain squares of ground in the city of New Orleans,

\*Reported by *Joseph P. Hornor*, Esq., of the New Orleans bar.

provided that the grants of the legislature were valid, and that the same series of acts of the legislature had given them also the right of way, and the right of putting down tracks and erecting depots upon these squares, as incidents of their right of way as a railroad.

The first right which was claimed was that "the complainants had acquired the fee to the land" in dispute; or, rather, the precise question was whether the fee was in the defendants or in the public. In the second suit they claim rights with reference to their right of way, viz., their right of way, with their right to put tracks upon the land, and to maintain buildings for depots. In both of these suits the lower court, which was the superior district court, had given judgment in favor of the complainants, maintaining thereby, in the one, the rights of the company as owners of the fee, and, in the other, their right of way, and the incidents with reference to tracks and depots.

1. With reference to the *fee*. In the twenty-sixth volume of the Louisiana Annual, 478, the docket number being 3,701, the supreme court rendered a decree annulling the judgment of the eighth district court, and dissolving the injunction which had been issued by that court, and giving judgment for the city of New Orleans, maintaining the reconventional demand of the city, and restraining the plaintiffs from occupying the property in controversy.

Upon a rehearing, at page 485, the court modified their judgment as follows:

"In our opinion the injunction improperly issued in this case; but, as the city has made no claim against the plaintiffs, our former decree was erroneous in granting the demand in reconvencion, and inhibiting the plaintiffs from occupying the property in controversy. Under the pleadings, all we can do is to render judgment in favor of the city, dissolving the injunction and dismissing the plaintiffs' suit, leaving the parties to their rights under the laws relative to the expropriation of property."

Then follows the final decree in the cause, as follows:

"It is therefore ordered that our former decree be set aside, and it is now ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant, the city of New Orleans, dissolving the injunction herein, and dismissing the plaintiffs' suit, with costs in both courts, without prejudice to the rights of both parties under the laws of expropriation."

2. As to the rights of the complainants which sprang out of the grant to them of the right of way and its incidents. In this case there was also a judgment in the eighth district court in favor of the complainants, and an original hearing and rehearing in the

supreme court. Upon the first hearing, Judge WILEY, in the case known as No. 3,692, thus states the question in rendering the majority opinion, at page 517:

"This controversy arises out of the acts of the nineteenth of March, 1868, the seventeenth of February, 1869, the twenty-first of February, 1870, granting to the complainants for passenger and freight depots a space of ground. \* \* \* Also granting the right to lay tracks, and occupy as a railroad, a strip of land extending down the levee to Elysian Fields street."

He then quotes a paragraph of the answer of the city, which in substance is that the use of that part of the batture for a railroad, and the enjoyment of the privileges granted by the legislature, would prevent its use as a *locus publicus* and highway.

Chief Justice LUDLING, at page 524, in his dissenting opinion at the first hearing, states the question thus: "The question involved in this case is simply whether or not the legislature can control the public quay or levee of the city of New Orleans without the consent of the city."

Upon the rehearing, at page 529, the majority opinion is rendered by Judge MORGAN very briefly as follows: "The sole question presented in this case is, has the state the power to grant to a railroad company the right of way through the streets of this city? A thorough examination of this question has led us to the conclusion that it has." And then follows the decree: "It is therefore ordered, adjudged, and decreed that the judgment heretofore rendered by us be avoided, annulled, and set aside, and it is now ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs."

If we turn to the decree of the district court as found in the printed record put in evidence, at pages 255, 256, we find it decreed that "the defendants be enjoined, prohibited, and restrained from, in any manner, interfering with or obstructing said plaintiffs in constructing or maintaining its railroad upon and on the levee, streets, and batture described and designated in the acts of the general assembly granting such rights and privileges to said company, and by the maps filed with the secretary of state and with the mayor of the city of New Orleans." They dismiss the reconventional demand of the city, and maintain the validity of the acts of the general assembly granting to the complainants the right to construct, maintain, and use its track, turn-outs, switches, depots, etc., along and upon the levee, streets, and batture in front of the city of New Orleans. And this judgment, by the final decree of the supreme court, was in all respects affirmed.

There is no doubt but that if a decree is free from ambiguity, it speaks for itself, and cannot be qualified by the opinion by which it may have been preceded. *Plicque v. Ferret*, 19 La. 318; *Keane v. Fisher*, 10 La. Ann. 261; *Trescott v. Lewis*, 12 La. Ann. 197; *McDonough's Succession*, 24 La. Ann. 34; 101 U. S. 351; 24 How. 333; *Smith v. Kernochen*, 7 How. 199. But I think that a careful analysis of the opinions, and of the decrees, shows that there is no ambiguity in either of the decrees, and that they are rendered in accordance with the opinions which, at the last, the supreme court formed. What the court meant to adjudge is also made manifest by what they say in the case of the city against complainants, (27 La. Ann. 415,) which was a case with reference to the power of the legislature to exempt complainants from wharfage dues. The court say (page 415) the grant was the control by the legislature of a public servitude.

Certainly this is true to the extent to which the injunction asked for in this cause goes, and it is only to that extent that the matter is involved. In the cause No. 3,701, which was first heard and disposed of, the supreme court had settled the question that the fee to that portion of the batture upon which this property was located was in the city of New Orleans, and in their decree upon the rehearing they maintained that view without change, amending their decree only so far as related to the reconventional demand of the city.

The matter involved in cause No. 3,692, at page 517, was, as I have stated,—conceding that the fee of the property was in the city, subject to the servitude which the public had, it being a quay or levee,—whether it could be controlled by the legislature without the consent of the city so far as to allow the plaintiffs their right of way, their tracks and depots; and it is clear that, comprehending fully the meaning of their decree, they had at last come to the conclusion that the legislature could so control a public place; for Judge WILEY, at page 529, in his brief dissenting opinion says he “concurs that the state can grant the right of way,” but dissents from the conclusion of the majority of the court because the company could only get the land necessary for tracks and depots by expropriation or purchase.

I do not say that this last decree is such a decree as I should have rendered, but I find it free from all ambiguity, and that it is manifest, by the opinions that preceded it, that the supreme court of the state intended to render just such a decree as the words used import; certainly, to the extent of giving the complainants the right which in this suit they ask to have protected.

This being my conclusion, it is my duty to treat the matter presented as a thing adjudged.

Let there be a decree perpetuating the injunction, so far as relates to the matters included in the foregoing opinion.

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ELGIN MINING & SMELTING Co. and others v. IRON SILVER MINING Co.\*

(Circuit Court, D. Colorado. November, 1882.)

1. MINING CLAIMS—END LINES.

In the location of mining claims, "end lines" must be established as required by the statute, and where the locator fails to do this, the courts will not fix them by implication. If the end lines be absent, or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied.

2. SAME—VALID ONLY WITHIN SURFACE LINES.

In such case the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist.

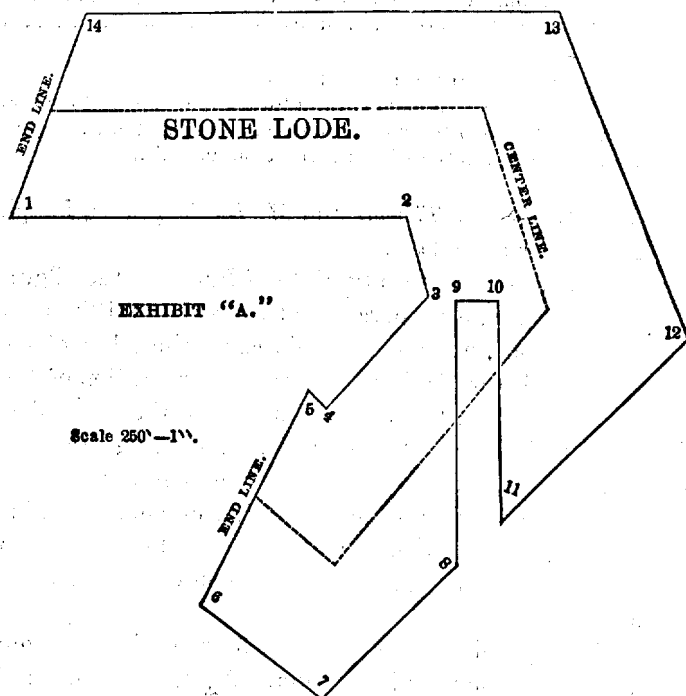
*Markham, Patterson & Thomas and M. B. Carpenter*, for plaintiffs.  
*Jonas Seeley*, for defendant.

HALLETT, D. J. On the twenty-ninth of June last, the Elgin Mining & Smelting Company, a corporation of the state of Illinois, and several natural persons, exhibited in this court their bill of complaint against the Iron Silver Mining Company, a corporation of New York, to restrain a trespass of the latter company on the Gilt-Edge mining claim, located in Lake county, Colorado. Asserting title to the Gilt-Edge claim, plaintiffs alleged that they had found a lode therein containing rich and valuable ore, and the defendant, claiming the same ore as being in and of a certain other lode owned by it and called the Stone lode, was proceeding to remove the ore and convert it to its own use.

After notice, defendant appeared and filed affidavits in opposition to plaintiff's application for injunction. As disclosed in the bill and affidavits, the controversy was mainly as to the right of defendant to follow the lode from the Stone claim, owned and worked by it, beyond the lines of that claim and into the adjoining claim owned by plaintiffs.

\*From the Colorado Law Reporter.

In its ordinary form, this controversy presents questions of fact as to the existence of the lode in both claims, or the extension of it from one claim to the other. One party, claiming to own the top and apex of the lode, seeks to follow it on its dip through the side lines of his claim into the land adjoining, as the right so to follow it is defined in section 2322, Rev. St.; the other, unable to deny the force of the statute, appeals to a jury on the point whether the top and apex of the lode arises in the ground of his opponent, or, if there, whether the lode descends from that region to the place in dispute. In addition to these questions, which were not pressed at the hearing, there is another and a very extraordinary question arising out of the peculiar form and relative position of the claims. And as it is very difficult to describe the claims fully in words, so as to explain the matter in dispute, a diagram will serve the purpose better:



The ore for which the parties are contending is within the surface lines of plaintiff's claim, (the Gilt Edge,) eastward from defendant's claim, (the Stone,) and adjoining the latter. It is reached by means of a perpendicular shaft from plaintiff's claim; and a tunnel or level,

following, it is said, the course of the vein from a point in defendant's claim down the hill-side, and below the other. Assuming, for the present, that the top and apex of the lode has been found in the Stone claim, owned by defendant, and that the lode in a downward course, and with distinct boundaries, passes eastward out of that claim and into the Gilt-Edge claim, owned by the plaintiff, to the place in dispute, the right of defendant to follow it without the lines of the Stone claim, and take the ore therein, is denied on the ground that the latter claim is without end lines to define and limit such right. In the act of congress relating to mineral lands it is provided, in section 2320, that "the end lines of each claim shall be parallel to each other;" and in section 2322, that the right of possession to the "outside parts" of veins or ledges, referring to such parts as extend beyond the side lines of the location, "shall be confined to such portions thereof as lie between vertical planes drawn downward as above described through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

In the *Flagstaff Case*, 98 U. S. 467, the acts relating to mineral lands were said to require that locations of veins or lodes shall be made lengthwise in the general direction of such veins or lodes on the surface of the earth; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally.

The general practice in mining districts of making locations in the form of a parallelogram conforms to this view, which is now universally accepted as correct. Obviously it was not intended that a locator should secure more of the lode in the "outside parts" extending beyond the side lines than he could obtain on the course of the lode within the limits of the location. In other words, by a proper location he could secure 1,500 feet on the strike of the lode, and by the extension of the planes of the end lines he would be limited to the same number of feet laterally in pursuing the lode downwards without the side lines. Such limitation is necessary to define the miner's right beyond his own territory. If, when once without his own lines, he could turn to the right or left in search of ore, the limitation to 1,500 feet of the length of the vein would be made wholly nugatory, and there would be no end of conflicts between adjacent owners, for which no just rule of settlement would be found.

Referring to the defendant's Stone claim, the line at the north-westerly end is said to be one of the end lines, and it is so marked

on the diagram. In the first course of the location from that line, which is S. 83 deg. E., there is no corresponding end line; and the same is true of the second course, S. 18 deg. E.; and the third course, S. 45 deg. W., very nearly. It will be observed that the location is in the form of the letter A, truncate, and the locator has made a part of the inner line of the southern leg of the location 300 feet in length, to correspond in direction with the line at the north-westerly end, and called it an end line. With superficial attention to the letter of the law, and in utter ignorance and disregard of its principles, the two lines were made of equal length and parallel to each other, but so arranged that they can never perform the office assigned to them in the law. What is called the southern end line is really on the north-west side of the greater part of the claim, and so placed that, when extended in a northerly direction, it must enter the inner line of the claim in a short distance from corner No. 5. In this position that line cannot enter the field north and east from the claim, being intercepted by the claim itself. And so it appears that, eastward and southward from the north-western end of the claim, there is no line which can be recognized as an end line, and the claim has but one end line, or perhaps none whatever.

This view was not controverted at the hearing, but it was said that end lines may be a matter of legal inference and deductions from established facts to control even the act of the locator of the claim. As the law requires that a location shall be made along the course or strike of a vein at the surface of the earth, the end lines must of necessity be at right angles to the course. And whenever the course or strike can be ascertained, at the points where it passes from the location, end lines should be fixed at right angles thereto, without reference to the end lines laid in the location. To apply this rule to defendant's claim, lines should be drawn parallel to each other at each end, and where the outcrop of the vein is said to pass out of the location, and in the general direction east and west, the strike of the vein being north and south.

The circular form of outcrop is thought to be the result of erosion in California gulch, which comes down through the middle of the claim, and at some remote time the outcrop may have extended directly across the gulch between the ends of the claim, so as to admit of a location in the usual form with end lines, as now proposed to be laid, in the general direction east and west. It is contended that in the location of a claim, which must of necessity be made before the strike of the lode can be ascertained, it is too much to expect



the locator to lay his end lines in the proper direction, and locations made at various angles of divergence from the strike of the lode are cited to illustrate the fact that by a slight deviation from the proper course the object of making a location may be defeated. This, however, is only to say that it is difficult to make a good location of a mining claim when the situation of the ore is unknown, and that if the locator fails to lay his claim so as to secure the ore, the law should correct his mistake. Plainly enough, the law requires the locator to fix the boundaries of the claim, offering the bounty of the government to the extent of the public domain from which to make the best possible selection. If the locator fails to choose wisely and well, the failure is with him, and it cannot be imputed to the law. There is no greater reason for saying that the end lines shall be established by inference and presumption from the course of the lode, than that the side lines shall be so established. The rule of the early miner's law, which obtained in some mining districts before the statute was enacted, was of the character which we are now asked to adopt. By locating on the vein the miner secured the number of feet allowed him, wherever it might extend, with surface ground adjacent, and, of course, the boundaries of the claim could only be known from the course of the lode. By the act of congress that rule was changed, and it was required that the boundaries of the claim shall be marked on the ground, and end lines and side lines are referred to in a way to show that they must be laid down with care. Under such a statute it cannot be necessary to discuss at length the power of the court to establish lines by construction, for no such power can exist. The end lines established by the locator must control, and if absent, or if so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied.

In that case the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist. With some information as to the situation of the ore, and the law relating to the subject, the end lines of the Stone claim could have been laid as it is now said they should be placed, and the failure to do so was owing to ignorance of facts necessary to intelligent action. It presents the common case of failure to obtain property through a mistake of fact or law, for which the party seeking the property is alone responsible. Against such error and misfortune the law does not relieve.

At the hearing, on plaintiff's motion for injunction to restrain the iron company from working within the limits of the Gilt-Edge claim, these reasons were thought to be sufficient to support the application, and the injunction was allowed. Recently the defendant has brought in a cross-bill, asking to enjoin the plaintiff from working in the same ground, and on that motion the whole subject has been reviewed, with the result now to be stated.

The defendant, in virtue of its ownership of the Stone claim, has no right to anything beyond the lines of that claim in any direction, and therefore the motion must be denied.

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LAUGHLIN v. MITCHELL.\*

(Circuit Court, S. D. Mississippi. 1882.)

1. TRUST—CREATED BY PAROL.

To establish a resulting trust created by a parol agreement, where the subject of the trust is real estate, the evidence must be clear and satisfactory.

2. SAME—CASE STATED.

Where a party, the husband of complainant, was largely indebted, and executed a mortgage or trust deed to real property owned by him to trustees, who offered the same for sale to the highest bidder, and the father of complainant became the purchaser thereof and assumed the payment of the creditors of the estate, which was to be made from the income of the property so purchased, the purchaser having agreed by parol that the purchase was made for the benefit of his said daughter, and the daughter remained in possession thereof till the bringing of her suit, *held*, that such parol agreement did not create a resulting trust in such real estate subject only to the incumbrance of the purchase money bid at the sale.

3. SAME—ESTOPPEL.

Where complainant subsequently accepted and recorded a deed or lease made to her by the purchaser, granting her an estate for life in said real estate, in which lease she acknowledged that the lessor was the sole legal and equitable owner of said real estate, she is estopped from assailing the lease and seeking to have the same declared void, and set aside as a cloud on her title after 10 years' enjoyment of the leased premises, and after the death of the lessor, and the devise of his remainder interest to a third party.

4. SAME—UNDUE INFLUENCE.

A passage in a letter written to the lessee by the lessor that, in the event of her refusing the terms of the lease and returning it, there is nothing "to prevent his putting an overseer on the place, or to prevent his executors from doing the same thing," where he does not say that he will dispossess her, but leaves her the option of returning the deed, and in that event proposes to leave her in possession of the house, garden, and appurtenances, and an income in place of the provisions of the lease, cannot be construed as undue influence.

In Equity.

\*Affirmed. See 7 Sup. Ct. Rep. 923.

*Alfred B. Pittman*, for complainant.

*Albert M. Lea*, for defendant.

HILL, D. J. This cause is submitted upon bill, answer, exhibits, and proofs, from which the following undisputed facts appear:

In the year 1846 David McCaleb, then the husband of complainant, was the owner of the land described in the bill and the subject of this controversy. He was largely indebted, and before that time had executed a mortgage or trust deed to secure a debt due one Jacobs, in which complainant joined, conveying to the trustees, Chilton and Searles, this tract of land, with the slaves and personal property thereon. The trustees, having advertised the time and place of sale, proceeded on the fifteenth of June, 1846, to offer the same for sale to the highest bidder for cash. There were present at the sale Jonathan McCaleb, an uncle of David McCaleb, who held a large debt against his nephew, and other creditors, or their counsel, who bid more or less for the property sold; but the whole of it was either struck off to Joseph E. Davis, the father of complainant, or the bids were transferred to him, so that he became the purchaser; the aggregate amount of the sales being \$28,581. Said Davis, so far as the creditors were concerned, continued to be the owner of the property; but David McCaleb and wife remained in possession as before the sale, up to McCaleb's death, which occurred about one year thereafter. Complainant remained in possession alone up to her intermarriage with E. C. Laughlin, her present husband, and they have remained in possession ever since.

On the twenty-seventh of December, 1858, Joseph E. Davis executed a lease or deed conveying said property, real and personal, to complainant for and during her natural life. This conveyance contained in it an acknowledgment that said Davis was the sole legal and equitable owner of the property. After being duly signed by said Davis, by complainant, and by her husband, it was delivered to complainant, and some five months thereafter it was duly acknowledged by complainant and her husband and recorded in the proper office.

Joseph E. Davis, by his last will and testament, duly probated and admitted to record, devised to the defendant, Joseph D. Mitchell, this land, described as "Diamond Place," then occupied by complainant, and in which, as declared by the will, she had a life estate.

These are undisputed facts.

The bill, in substance, charges that Joseph E. Davis made the purchase mentioned as trustee for the complainant, with the understanding that the income of the property so purchased should be applied to the payment of the purchase money, and that so soon as the same was paid to those to whom it was due, or so soon as complainant should refund to her father the sum he might have to pay to discharge the purchase money due, he would convey to the complainant all the legal and equitable title to the property, real and personal.

In other words, that by said parol agreement he became her trustee, and held the property as such, subject only to the incumbrance of the purchase money bid at said sale. This allegation is denied by the answer, which raises the first question to be determined.

The bill further charges that the lease, with the declaration of title in Joseph E. Davis, the lessor, executed on the twenty-seventh day of December, 1858, was procured by the threats and undue influence of said Davis, and is therefore null and void. This is also denied in the answer, and raises the second and more important question.

The prayer of the bill is that this lease be declared void and set aside as a cloud upon complainant's title to this land, the allegation of the bill being that all the purchase money has been paid, or, if not, that an account of the balance due be taken, which complainant declares she is ready and willing to pay; and that upon the ascertainment that she has fully paid all such sums as in equity she ought to have paid, or upon her payment thereof now, that she may be decreed to have the absolute, indefeasible title of said property as against defendant.

These questions will be considered in the order stated.

It is admitted that the testimony of the complainant as to the understanding and agreement between her and her father, relating to the creation of the alleged trust, is incompetent and cannot be considered. Aside from this testimony there is no direct evidence going to establish the agreement or understanding upon which the alleged trust is based. Quite a number of witnesses testify that the general understanding in the neighborhood was that Mr. Davis had purchased the property for the benefit of complainant. This testimony, when all the weight claimed for it is given, fails to establish the trust asserted, for it only goes to establish the fact that the purchase was intended for complainant's benefit, and this would be fulfilled by giving her and her family a home and a support from the proceeds for a longer or shorter time. The most direct testimony bearing upon the understanding of the parties is found in the written correspondence between them, commencing with the letter of Joseph E. Davis to his daughter, September 12, 1849. This letter, so far as it relates to the question under consideration, is as follows:

"Your letter by Jim was duly received. I am sorry to find you so much under the influence of idle gossip. The opinion of others, in such matters as relate to our moral conduct, it is right to respect. Such as would inquire into the private affairs of others is entitled to as much respect as is the cackling

of geese, and we must feel humbled in our own estimation when we would allow them to exercise an influence on our conduct, or affect our happiness.

"But to come to the subject of your letter. I had assured you that, by will, I had left the Diamond Place to you, subject to the debt due upon it, which is now about \$20,000, now due and payable to the house of Wm. Laughlin & Co. How much more may be incurred in the course of litigation I am unable to say. I certainly have not interfered in its management, except such aid as I could give it, and am surprised to hear that Mr. Laughlin felt any apprehension or hesitation from the fear that I would not approve his acts. I expected that from his want of experience he would hesitate, and, when convenient, consult me for his own advantage; yet in all matters of evident propriety he would not wait for advice. You ask my opinion upon his return to New Orleans. I am as little able to answer as any one. I suppose his business or interest in the house to be worth more than the proceeds of the plantation. I did not know his means, or the necessity of his continuance, the probable income of the house, or any other fact to enable me to form any opinion. Now, if Mr. L. has the means and is disposed to pay the amount due upon the estate, I will, or you may, as the case may be, execute a mortgage to secure him in this advance.

"I mentioned in former letter to you that from no want of confidence in Mr. L., but from a desire to secure you against any misfortune that even the most prudent are liable to, I thought it best, both for your interest as well as his, that your property be kept separate. I still think so. I cannot understand your sensibility in the matter. Things are in precisely the same situation they have been for years past. I have interfered no further now than formerly. You, nor any one else, as far as I know, thought you could be degraded by dependence on your father. I expected Mr. Laughlin to exercise all the authority that was necessary and proper for the government of the place, and to act in all respects for your common benefit, and, so far as my wishes are concerned, prefer his remaining.

"The proceeds of the place will require time and economy to pay the debts, and if he could accomplish it at an earlier day by returning to New Orleans, it is a sacrifice you should make for his advantage. But it would not do for you to accompany him before the season of yellow fever was over.

"I would say in conclusion that I have no interest of my own that is to be affected. The interest is yours, and as it is likely to affect you only, am I influenced."

To this letter Mrs. Laughlin soon after replied in substance as follows:

"We both know that all you propose is for our benefit. Nothing can affect that conviction, but others have imagined that you withheld the title from me because you were afraid to trust him with the management of the place. Might he not, sensitive as he is, think so too? By economy we can pay the debt, and such economy we will exercise, but then he wishes your unlimited confidence. Mr. Laughlin is too noble and true-minded, too disinterested, to care whether the property was in my name or his, in any ordinary case. In

this, he has often said he would only live here in case it was secured to me, for he takes the same view of the matter you do, and thinks it safest to guard against misfortunes that can affect others as well as ourselves. In my obscure way of writing I often mislead you with regard to myself. I am always pained to see it, but still more so when I think I have injured in your good opinion one so much more deserving as Edmund is."

These letters and others, together with other testimony bearing on the point, I am satisfied establish the fact that Joseph E. Davis purchased this property with the purpose of letting McCaleb, his then son-in-law and complainant, remain on the plantation and control it, with the slaves and other personalty, intending to hold the legal title to all of it, and making himself personally responsible for the expenses of the place; but that the income should be applied to the payment of these expenses, and also the personal expenses of his son-in-law and daughter, and the remainder applied to the purchase money, for which he was liable. When this was done, he would convey or secure by his will a title to complainant, whether in fee or only for life does not very clearly appear.

No complaint seems to have been made to the condition of affairs during the life-time of McCaleb or the widowhood of complainant. But after her intermarriage with E. C. Laughlin, which occurred about two years after the sale, and before the letter of Joseph E. Davis of September 12, 1849, and within a year after this marriage, a desire sprung up, no doubt originating with Mr. Laughlin, in which his wife sympathized, to obtain the legal title. Hence the appeals of Mrs. Laughlin in that regard. Complainant during all this time, recognized the title to the property as being in her father, and that it was incumbered for the payment of the balances of the purchase money, to whomsoever it might be due.

This condition of the property and state of the title continued until December, 1858, when the lease referred to was executed. The proof shows that when this instrument was executed Mr. Davis was in bad health, and, the probabilities are, desired this matter settled. Having, whether right or wrong, all the time regarded himself as the legal and equitable owner of the property, with full power to dispose of it as he might think proper, he did not desire to leave any controversy arising out of it to be settled after his death. It appears from the evidence that complainant was childless, and was likely to remain so; that Mr. Davis had a dislike for the children of William Laughlin, who had been left orphans, and whom complainant and her husband had taken to raise and educate, and to Laughlin himself.

Doubtless, for these reasons, he desired to limit the title in his daughter to a life estate.

The proof discloses that Mr. Davis sent for his daughter, and afterwards for her husband; that he had prepared the instrument called the lease, and, after signing it himself, requested complainant and her husband to do so. Finding that it conveyed only a life estate, they were very much dissatisfied with its provisions, and signed it with reluctance. They left and did not return, but carried the lease with them.

On January 4, 1859, and nine days after the execution of the lease, Joseph E. Davis, in reply to a letter received from Mrs. Laughlin, wrote her as follows:

"I am sorry to receive such a letter from you, my dear child. You write as if I had deprived you of something that was yours, and speak of your being made a tenant at will. Now it is exactly what the deed is intended to prevent. There is nothing now to prevent my putting an overseer on the place, or to prevent my executors from doing the same thing. If you think your situation is to be bettered you may return the deed. I will leave you in possession of the house and garden, and appurtenances, with an income.

"As to statement of account, much of it has no relation to my purchase, the Guion debt and the Jacob debt. But you will recollect that nothing has been paid but from the proceeds of the place, which is mine. I leave you in the full enjoyment of the income for life. Now, who has the right to dispose of the earnings of his labor? I very much regret any feeling of the kind, and would still more regret any publicity by taking possession of the place or exercising authority over it, but it seems no generosity or line of conduct is satisfactory."

The lease or deed was retained by complainant and her husband until the thirty-first day of May, 1859, and then by them acknowledged and put on record. Mr. Davis did not acknowledge it. It in substance conveys the property for life to complainant, and Mrs. Laughlin and her husband covenant to manage it in a husband-like manner, and at the termination of the lease to quietly surrender the same to said Davis or his representatives; and then follows the acknowledgment that the sole, legal, and equitable title and right of property is in said Joseph E. Davis. This lease left Mrs. Laughlin in possession of the property for life, free from any obligation to pay any part of the debts of the place, or the balance of the purchase money due, which, including the sum due William Laughlin & Co., in the fall of 1849, amounted to \$20,000, for which Joseph E. Davis acknowledged himself bound, and which, except such part as was

afterwards paid from the proceeds of the plantation, it is to be presumed he paid, as he was solvent. To this must be added \$4,525, recovered after that time in the Guion suit, and how much more Davis paid cannot be ascertained from the proofs submitted. An examination of the account of sales of cotton from the plantation for the year commencing November 15, 1849, and including November 27, 1850, shows that they amounted to \$4,168.63, while the account of William Laughlin & Co., with the Diamond Place, from April 1 to November 15, 1850, shows charges, other than those connected with the payment of the purchase money, or anything due to said Davis, of \$5,893, thus showing that this indebtedness was increased instead of diminished. Indeed, the account shows on November 20, 1850, a balance due William Laughlin & Co. of \$22,830. It is very evident from all the proof that there continued to be a large balance due against Diamond Place, either to Mr. Davis or to others, to whom he was bound at the time the lease was executed. But other questions presented under the pleadings and proofs render it unimportant to examine further into these accounts.

Has Mrs. Laughlin shown such a title, legal or equitable, to the lands in controversy as entitles her to have the cloud upon her title removed according to the prayer of the bill? If not, the bill must be dismissed. But, if she has shown such title, the next question is, does it appear that the lease or instrument of December 27, 1858, is such a cloud as a court of equity, by its decree, will declare void and remove? It is not claimed that a *resulting trust* has been established. The trust asserted is one created by a *parol agreement*. Now, when the subject of the parol trust is real estate, all the authorities hold that to establish it the evidence must be clear and satisfactory. There being no conflict as to this rule, reference to the authorities is unnecessary. Applying the rule to the evidence in this case, I am of opinion that the trust is not sufficiently established.

It is insisted that at the sale it was understood that Davis was purchasing the property for complainant, and that on that account Jonathan McCaleb and others present refrained from bidding, or did not bid as much as they otherwise would. The proof is somewhat conflicting on this point, but the weight of the evidence is that all bid who desired to do so, and that Davis complained that it was run up on him by Jonathan McCaleb and others who held large demands against David McCaleb.

The testimony shows that Joseph E. Davis contracted with the overseer for the year 1849, as appears from his letter to E. C. Laugh-



lin, in which he informs him of the number of bales of cotton the overseer was to receive. As already stated, the proof shows that both parties regarded Mr. Davis as holding the legal title, and the right to have the income of the plantation applied to the payment of the purchase money bid by him at the sale, and the other claims against the Diamond Place. Complainant could not claim under those circumstances to have the title conveyed to her until all these demands were satisfied, even admitting the understanding between her father and herself at the time of the sale, as alleged in her bill. I am satisfied from the proofs that this was not done at the time the lease or deed of 1858 was executed.

The parties were competent to act and to contract between themselves, and, no fraud, mistake, or undue influence intervening, had a right to enter into the contract or agreement set forth in the deed or lease of 1858. That Mrs. Laughlin is a woman of unusual intelligence, and was then with a sufficient amount of will power to contract and to manage her own affairs, is apparent from her different letters in evidence; and that her husband is a man of at least ordinary intelligence, is apparent from his letters and testimony. The proof shows no fraud or deception on the part of Mr. Davis.

There remains only the charge of undue influence. That complainant and her husband did not get the title they desired is manifest. The letter of Mr. Davis of January 4, 1859, is relied upon as constituting a threat that if she did not accept the terms of the lease he would dispossess her and place an overseer on the plantation. The letter does not bear this construction. He says there is nothing now "to prevent his putting an overseer on the place or to prevent his executors from doing the same thing," in the event of her refusing the terms of the lease and returning it. He did not say that he would dispossess her. He leaves her the option of returning the deed, and in that event proposes to leave her in possession of the house, garden, and appurtenances, and an income, in place of the provisions of the lease. She was thus left the option to accept the one or the other, or to refuse both, and stand upon whatever her legal or equitable rights might have been. After waiting nearly five months and deliberating upon the proposition, without any further influence upon the part of her father, so far as the evidence shows, and with ample time to consult counsel and friends, they, and not Mr. Davis, placed the lease on record, thus accepting its terms and enjoying its benefits, with no attempt to revoke it until the filing of this bill, June 25, 1881, a period of nearly 22 years. It does not

appear that any intimation was given to Mr. Davis after that time of dissatisfaction with the terms of the lease, nor was he advised of any intention to assail it during his life-time.

March 18, 1869, Mr. Davis made his will, by which he devised the remainder interest in this real estate to the defendant. Ten years thus elapsing after the lease was recorded by Mrs. Laughlin before Mr. Davis made his will, he was justified in the belief that he had the right and power to devise this remainder interest to whom he pleased, and for this reason, if there were no other, I am of opinion that complainant is estopped from assailing this lease now, and is not entitled to have the same declared void and a cloud upon her title. She was fully cognizant of all the facts in relation to her title, and in relation to the execution of the instrument during the life-time of her father. To wait until after his death, and until after the death of most of the persons who could have had any knowledge of the transaction, and after her father, by will, had disposed of his estate, presumably, in some respects, in a manner otherwise than he would have done had he not believed himself possessed of this property, and then attack his will, would be inequitable and unjust.

Many authorities have been read and commented upon by the learned counsel on both sides, who have presented the questions involved with an ability rarely equaled, in this court, at least; but, with the view I have taken of the facts of the case, the rules of law controlling it are elementary, and a citation of authorities would but extend this opinion, already too long, without throwing further light upon the issues involved.

The result is that the relief prayed for in the bill must be denied, and the cause dismissed at complainant's costs.

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### THOMAS v. POLICE JURY OF PARISH OF TENNES.\*

(Circuit Court, E. D. Louisiana. December, 1882.)

#### 1. REVIVOR—REV. ST. 955.

The effect of the statute of 1789, (vol. 1, p. 90, § 31; Rev. St. 955,) is that the suit descends to the representative of the deceased party, be he heir, executor, or administrator, as the case may be. An acquired jurisdiction on the part of the United States circuit court will not be ousted by a state statute which, but for that previously existing jurisdiction, would have vested it elsewhere.

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

## 2. ADMINISTRATOR—NATURAL TUTRIX.

The natural tutrix of the minor children is, under the law of Louisiana, clothed with the authority to administer the succession of the estate of the deceased parent.

*Thomas J. Semmes and Edward H. Farrar, for plaintiff.*

*E. T. Merrick, W. H. Foster, and E. T. Merrick, Jr., for defendant.*

BILLINGS, D. J. After the commencement of this suit the plaintiff died. He was at the time of the institution of the suit, as well as at the time of his death, a citizen of the state of Mississippi. Upon the suggestion of his death an order was entered that the suit be revived, and that Mrs. Virginia Thomas, widow of former plaintiff, have leave to prosecute the same as administratrix of his estate and as natural tutrix of her minor children. This hearing is upon a motion to vacate that order as having been improperly entered.

The facts which appeared upon the hearing were as follows: The death of B. R. Thomas; that he was domiciled in Mississippi; the appointment there of Mrs. Virginia Thomas as administratrix of his estate; and her recognition in this state as natural tutrix of the minor children.

My conclusion is upon these facts that she may continue this suit.

It has never been decided that under the statute (vol. 1, p. 90, § 31) it was necessary for the administratrix, in order to revive a suit, to have taken out letters within the state where the cause was pending. The court is already seized of jurisdiction, and the question would be whether the effect of the statute is not that the suit descends to the representative of the deceased party, be he heir or executor or administrator, as the case may be, in such a way that the only proof necessary is of the death and of that relation.

But it is not necessary to consider that question in this case, for if we concede that it would be necessary to hold that the proof of administration must be the same to entitle a party to revive as to commence a suit, such an administration is established. The natural tutrix of the minor children is under our law clothed with the authority to administer the succession of the estate of the deceased parent.

In *Bryant v. Atchison*, 2 La. Ann. 464, the court says it is immaterial whether the property of a succession, in theory, vests partly in creditors or wholly in heirs; that the tutor of minor heirs may, as such tutor, administer the succession, and may bring suit. Whether she has omitted to give bond, or whether there are major heirs, is matter to be established by proof, and until so established will not be assumed.

So, the objection that the assumption of domicile in this state was pretended, cannot be heard in this forum. Whatever ground it might furnish for a revocation of the appointment in the court appointing, it cannot be listened to here. See, also, *Labranche v. Trepagnier*, 4 La. Ann. 561; *Hair v. McDade*, 10 La. Ann. 534. In *Ventriss v. Smith*, 10 Pet. 169, the person conducting the suit was only a non-resident administrator, appointed *ad collegendum*; and even there the court held the authority sufficient.

It is also urged that under the Mississippi law of inheritance the widow inherits the portion of a child. This is true, but it is also true that the choses in action vest in the administrator or executor; therefore the right possibly to receive a portion of the fruits of the administration would not affect the right of Mrs. Thomas to maintain such a suit there as administratrix and here as tutrix. The exception is overruled, and the motion to vacate the order is refused.

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REVIVOR. The section extends to every action where the cause of action survives, (*Hatfield v. Bushnell*, 1 Blatchf. 393; *Trigg v. Conway*, Hemp. 711,) but is confined to personal actions, (*Macker v. Thomas*, 7 Wheat. 530; *Green v. Watkins*, 6 Wheat. 260;) nor does it relate to or affect suits in admiralty, (*The James A. Wright*, 10 Blatchf. 160; but see *The Norway*, 1 Ben. 193.) The revivor of the suit by or against the representative of deceased is a matter of right, and is a mere continuation of the original suit, without distinction as to citizenship. *Clarke v. Mathewson*, 12 Pet. 164; S. C. 2 Sumn. 262. The death may occur before or after plea or issue joined, or before or after interlocutory judgment, and the proceedings are to be as if the representative was a voluntary party to the suit, (*Hatch v. Eustis*, 1 Gall. 160;) so it may occur before entry of a decree from which an appeal was taken, (*Story v. Livingston*, 13 Pet. 359.) The executor may be made a party on his own motion, but he must show that he is executor, and produce letters testamentary if required. *Wilson v. Codman*, 3 Cranch, 193. The suit will be continued in the name of the representative, (*Richards v. Maryland Ins. Co.* 8 Cranch, 84,) and the adverse party is not entitled to a continuance, (*Wilson v. Codman*, 3 Cranch, 193; *Griswold v. Hill*, 1 Paine, 483.) Upon a bill to revive, the sole question before the court is the competency of the parties and correctness of the frame of the bill to revive. *Bettes v. Dana*, 2 Sumn. 383. On the marriage of a *feme sole a scire facias* may issue in the name of the husband and wife to enable her to prosecute the suit. *McCoul v. Le Kamp*, 2 Wheat. 111. A bill of revivor cannot be brought against a representative in a state other than whence their authority proceeds, (*Mellus v. Thompson*, 1 Cliff. 125;) nor can it be filed against an administrator of a defendant who neither appeared nor was served with process, (*U. S. v. Fields*, 4 Blatchf. 326.)—[Ed.]

## UNITED STATES v. WILDER.\*

(Circuit Court, S. D. Georgia. November, 1882.)

## CRIMINAL PRACTICE—REV. ST. § 866.

A commission will be allowed to the defendant in a criminal case to take depositions of witnesses residing abroad, under section 866 of the Revised Statutes. Whether such depositions can be admitted in evidence upon the trial of the case, is a question that does not need to be decided until then; and if they be not allowed to go before the jury, in case of conviction will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence.

## Information for Smuggling.

S. A. Darnell, Dist. Atty., for plaintiff.

Henry R. Jackson, for defendant.

PARDEE, C. J. The defendant, who is charged by the United States attorney with smuggling, submits a petition and affidavit showing that he has witnesses beyond the United States who are material to his defense, and he asks a *dedimus potestatem* to take the depositions of said witnesses under section 866 of the Revised Statutes. The application is resisted by the district attorney on the grounds that it is unprecedented, and without authority, to take the evidence of witnesses in criminal cases by commission, and that the evidence, if taken, would be inadmissible on the trial.

It is so abhorrent to all ideas of justice that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case may be and probably is unprecedented in the United States courts in criminal cases, but I am informed is permitted in state courts of Georgia, and is allowed by statute in other states. At all events, the government cannot be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be con-

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

victed, the testimony will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence in the case.

Let the commission issue as prayed for; the district attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned 10 days before the next term of this court.

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MOLLANDIN *v.* UNION PAC. RY. CO.\*

(Circuit Court, D. Colorado. October Term, 1882.)

1. EMINENT DOMAIN—USE OF STREET IN A CITY FOR RAILROAD PURPOSES—RIGHTS OF OWNERS OF ABUTTING LOTS.

Under section 15, art. 2, of the constitution of the state of Colorado, the owners of lots abutting on a street in a city are entitled to compensation for the use of the street for railroad purposes.

2. SAME.

Whether the title to the street is in the owners of lots or in the city, the rule is the same. *Rigney v. City of Chicago*, 102 Ill. 64, followed.

*S. E. Browne*, for plaintiff.

*Willard Teller*, for defendant.

Plaintiff set up title to lots 1 to 7, inclusive, in block 1, in Hoyt & Robinson's addition to the city of Denver, fronting, 216 feet on Wewatta street, on which he had erected a hotel and several dwelling-houses. After the buildings were erected, and in September, 1881, defendant laid a railroad track through Wewatta street in front of plaintiff's property, about 18½ feet from the sidewalk. The track is above the level of the street, and in itself a considerable obstruction to loaded wagons, and light wagons could not pass over it easily in front of plaintiff's property. But the crossings on either side at Nineteenth and Twentieth streets are convenient for all vehicles. Two other tracks were laid in Wewatta street, on the opposite side from the plaintiff's property, by other companies which were not parties to this action. Plaintiff alleged that by the track laid by defendant, and the use made of it, his "facilities for ingress to and from his said hotel and dwelling-houses and lots has been greatly interrupted and cut off, and his said hotel and dwelling-houses have been exposed to damage by fire, and the rental value of his property

\*From the Colorado Law Reporter.

greatly diminished, and he was subjected to great inconvenience, to his damage in the sum of \$15,000."

The answer denies most of the allegations of the complaint, and alleges that the Colorado Central Railroad Company, in May, 1871, owned a railroad extending from Golden to Denver and elsewhere in the state of Colorado; that the city of Denver then, and ever since that time, owned the said Wewatta street by title in fee, and that on the twenty-fifth day of May, 1871, the city, by ordinance, granted to said Colorado Central the right of way for its track in and through the said Wewatta street. The ordinance was set out in the answer in full, and appeared to be of the scope and effect as stated. It was further alleged that on the first day of March, 1879, the said Colorado Central Railroad Company made and executed to the defendant a lease of its lines, tracks, rolling stock, and property, and all its franchises, whereby the defendant acquired a right to build its said road in the said Wewatta street.

Plaintiff denied that the fee to the said Wewatta street was in the city, and claimed that the dedication of the street to public use by Hoyt & Robinson was an easement only, reserving the fee to the owners of abutting lots. It was understood that this point would turn on the meaning and effect of certain statutes of the late territory, in force at the time the plat of Hoyt & Robinson's addition was put on record, and also on the grant attached to the said plat. The case went off on another point, however, and the matter of the ownership of the street was not in any way investigated.

It seemed to be conceded, in the replication to the answer and by plaintiff's counsel at the trial, that the right of way in Wewatta street was given by ordinance to the Colorado Central Railroad Company, and that the latter company had executed a lease to defendant, as alleged in the answer.

But it was contended that this was no defense to the action, because the right and interest of the plaintiff in the street in front of his property is secured to him by section 15 of the bill of rights of the state constitution. Rev. St. 30. That section declares that "private property shall not be taken or damaged for public or private use without just compensation;" and although it has been said that property cannot be "taken," within the meaning of that provision, except by an appropriation of the land itself, no such limitation is applicable to the clause relating to damages. The beneficial use of plaintiff's estate embraces the right of ingress and egress, which cannot be withdrawn or obstructed without substantial damage to it.

The use of Wewatta street is therefore a right of property in plaintiff, which if not "taken" is certainly "damaged," within the meaning of the constitution, by the act of defendant in building its road through that street. This point did not arise in the case of the present plaintiff against the Colorado Central Railroad Company, reported in 4 Colo. 154, and that case is not controlling. The question is discussed in *Rigney v. Chicago*, 102 Ill. 64, with the result now suggested. That case is very significant, showing that a change in the phraseology of the constitution of the state of Illinois was intended to enlarge the remedy.

Of this opinion was the court, (HALLETT, D. J.,) and the jury was advised that the plaintiff was entitled to damages, and after deliberating they returned a verdict of \$1,850.

Several questions relating to the measure of damages are to be considered on motion for new trial

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MORSE, Petitioner, v. DUNCAN, Receiver, etc.\*

(Circuit Court, S. D. Mississippi. November 29, 1882.)

1. RAILROADS—DUTY OF EMPLOYEES IN CHARGE.—It is the duty of those in charge of a railway train, on approaching a station where such trains stop, upon being flagged so to do, to be on the alert and look out for such signal, and stop when it is given.
2. SAME—DAMAGES—PERSONAL INJURY—SHOWING REQUIRED.—In the absence of gross negligence, recklessness, willfulness, malice, insult, or inhumanity, actual damages can only be allowed.
3. SAME—RECOVERY.—No recovery can be allowed for inconvenience or even physical hardship when the same are voluntarily undertaken.
4. SAME—GENERAL RULE.—The general rule is "that pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity."

W. G. Grace, for petitioner.

E. L. Russell and B. B. Boone, for respondent.

HILL, D. J. This is a petition claiming \$1,000 damages of the defendant for the alleged default of his employes in neglecting to stop defendant's passenger trains at Marion, a flag station on the Mobile & Ohio Railroad, of which defendant is receiver, to take peti-

\*Reported by B. B. Boone, Esq., of the Mobile, Alabama, bar.



tioner on board said trains and transport him to Scooba, on said road. The allegations of the petition are denied.

The proof shows that petitioner went to the station at Marion on the morning of December 29, 1881, to take the train for Scooba; that the train passed the usual place for stopping to put off and take on passengers, and that after remaining some four or five minutes it passed on; that before stopping the whistle was blown to give notice of the coming of the train and the intention to stop; that passing the usual place of stopping was for the purpose of transferring a lady and her children, with their baggage, from the train to a freight train, to be returned to Meridian, where she had gotten on the train by mistake; that not being flagged, or having any notice that any one wished to get on the train at that place, the train passed on. There is no allegation in the petition, or any proof, that the train was flagged that morning. The petitioner was advised by an employe of the postmaster at Marion that the train would back down to the usual place of stopping, and he did not attempt to get on the train and was left. This was a misfortune to the petitioner, but without fault on the part of the conductor or other employes of the defendant; hence no recovery can be had for this misfortune. The proof by the petitioner and another young man who designed to take the train on the same morning, as well as by the employe of the postmaster, who took the mail to the train and received it, and who was in the habit of giving signals for the stoppage of the train, is that on the thirtieth inst. he did flag it for the purpose of stopping the train to enable the petitioner and the other witness to get on the train, and that it passed on without stopping. The conductor and the engineer in charge of the train testify that their uniform custom is to look for the signal at that place, and that none was given that morning. I presume that the witnesses on the behalf of the petitioner testify truly, and that the signal was given, and must believe that defendant's witnesses testify truly in stating that they did not see the signal, and can only reconcile the conflict by holding that they were mistaken in their opinion that they noticed or looked for the signal sufficiently to discover it, and which it was their duty to have done.

Under these circumstances petitioner is only entitled to the actual pecuniary damages he has shown he sustained by reason of his failure to get upon the train that morning. He alleges, but does not prove, that he had to procure a private conveyance and go with his trunk to Meridian to get on the train. He does not prove that he paid anything for this conveyance; but presuming that he did, and had to

pay for his night's lodging and for supper, five dollars would cover the amount, including loss of time. He further proves that when he arrived at Scooba the conveyance which was there the day before had left, and that he had to walk through the mud a distance of 12 miles and procure a wagon next day and return for his trunk, for which his brother-in-law charged him \$2.50, which was certainly a full price for a brother-in-law; but, if he had chosen so to do, he could doubtless have procured a conveyance from Scooba for five dollars that would have taken both himself and trunk home the day he arrived, and saved himself that muddy walk. Inasmuch as this muddy walk was undertaken voluntarily by the petitioner, no compensation can be allowed him therefor, (*Francis v. St. Louis Transfer Co.* 5 Mo. App. 7; *Trigg v. St. Louis, K. C. & N. R. Co.* 6 Am. & Eng. R. R. Cas. 349;) so that five dollars for his actual damages at this end of the line will be full compensation, unless we consider the extreme anguish of mind he endured. If he is not more fortunate than most men, he will meet many as severe anxieties in life without a thought of compensation. The general rule is that "pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity." *Pierce*, R. R. (Ed. 1881,) 362; *I. B. & W. Ry. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Transfer Co.* 5 Mo. App. 7. Had the engineer or conductor seen the signal and disregarded it, then punitive damages might have been awarded; but as the signal used was one of danger—a red light—it is not to be presumed either of them saw it, and disregarded it so that its non-observance was more an accident than otherwise, for which, as already stated, none but actual damages can be awarded. *Nelson v. A. & P. R. Co.* 68 Mo. 593; 2 *Redfield, Railw.* (5th Ed.) 262; *Milwaukee R. Co. v. Arms*, 91 U. S. 489; *C., St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456.

The receiver will pay the petitioner the sum of \$10; and, as there is no proof that this sum was tendered, will also pay the costs of this proceeding.

## SMITH and others v. COLORADO FIRE INS. Co. and others.

(Circuit Court, D. Colorado. October 10, 1882.)

1. PLEADING—JOINT ACTION AGAINST CORPORATION AND STOCKHOLDERS.—Under section 201 of the chapter relating to corporations in the state of Colorado, a joint action may be maintained against a corporation and the owners of unpaid capital stock thereof, and a count in a complaint based upon this section is not demurrable for misjoinder of parties.
2. SAME—MAKING REPORT.—A joint action cannot be maintained against the officer of a corporation and the corporation itself for failure to comply with section 206 of the chapter relating to corporations, requiring a report to be made stating the amount of its capital, existing debts, etc.
3. SAME—FAILURE TO ORGANIZE LEGALLY.—When persons get together and assume to be a corporation, without complying with the terms of the statute in regard to organization of corporations, they may be severally and jointly liable as individuals for the debts contracted in the corporate name, but they cannot be made *joint defendants with such corporation* in an action.

## Ruling on Demurrer.

HALLETT, D. J. James P. Smith and two people called Sargent sue the Colorado Fire Insurance Company, S. Eldridge Smith and William A. Ellis and George C. Glass, upon a policy of insurance issued by the Colorado Company. After describing the policy and the destruction of the premises by fire, and so on, plaintiffs allege in the first count that the defendants Smith, Ellis, and Glass were the owners of equal parts of the capital stock of the insurance company, which is wholly unpaid by them, and they seek apparently in that count to recover the amount of the policy from the defendant company, and from these natural persons, the owners of the stock, jointly.

Section 201 of the chapter relating to corporations declares that the stockholders shall be liable for the debts of the corporation to the extent that may be unpaid of the stock held by them, to be collected in the manner herein provided. Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more of the stockholders at the same time to the extent of the balance \* \* \* by them respectively, whether called in or not, as in cases of garnishment.

I do not understand that the defendants made any objection to that count; it appears to be based upon the section of the statute, and to be within its provisions.

In the second count plaintiffs set up the same policy of insurance, and the destruction of the premises by fire, and aver that at the time of the execution and delivery of the policy the corporation had not, nor

has since, made a report stating the amount of its capital, \* \* \* existing debts, etc., \* \* \* as required by section 206 of the chapter relating to corporations. That section requires a report to be made as described in this count of the declaration, and declares that if they shall fail to do so, and the capital stock has not been fully paid in, the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year preceding it, \* \* \* and until such report shall be made. In this count it is sought to charge these natural persons, defendants, with the corporation, as trustees of the corporation. The statute does not, so far as I can discover, give any authority for suing the corporation with the trustees in any cause of action arising under that section, and without some provision of the statute the action cannot be maintained. The liability upon this section arises for a failure on the part of the officers to perform the duty enjoined upon them by the statute. It cannot be said that the corporation itself is guilty of the same failure with the officers on whom the duty is enjoined, and it is impossible to say that the corporation is to stand with them upon such liability in the absence of any provision of the statute authorizing it.

In the third count, the plaintiffs declare on the policy of insurance as in the other counts, and allege that although the stock of the corporation had been fixed by the certificate which they had made and filed, that it had not been divided and subscribed for, or distributed to any person or persons whomsoever. That count proceeds upon the theory of wrong-doing on the part of these incorporators in commencing business before they had fully organized their company,—before there was any capital stock paid in which could be liable for the debts of the company. I do not doubt that there is liability on the part of the persons who do the things that are charged in this count; but the question here is whether they may be liable with the corporation itself, because this is an action in which the corporation and the persons who organized it are sued jointly. I think it may be said, when persons get together and assume to be a corporation without complying with the terms of the statute, without having a subscription of stock, as the law requires, in forming the organization, that they may be jointly and severally liable as individuals for the debts contracted in the corporate name, but is not sufficient to say to maintain this; and the action here, as I stated before, is against the corporation itself, and these persons are, as I think, proceeding upon some theory of deceit,—an action on the case, as we

used to call it before the legislature abolished all names,—and I don't think that these defendants can be jointly liable with the corporation in that way.

The result of all this is, the demurrer must be overruled as to the first count of the complaint, and sustained against the other two counts on the ground that there is a misjoinder of defendants.

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### RAE V. GRAND TRUNK RY. CO.

(*Circuit Court, E. D. Michigan. November, 1882.*)

#### 1. JURISDICTION—WANT OF—DISMISSAL ON MOTION OF COURT.

It is no longer necessary to take advantage of the want of the requisite citizenship by plea in abatement. If this or any other defect of jurisdiction appears upon the trial, it is the duty of the court upon its own motion to stop the proceedings and dismiss the suit.

#### 2. SAME—AMENDMENTS NOT ALLOWABLE.

An amendment to the declaration, designed to raise a question "under the constitution and laws of the United States," and thereby to create a case cognizable by the circuit court, irrespective of the citizenship of the parties, will not be permitted unless it appears that it will be likely to avail the plaintiff.

#### 3. RAILROADS—STATUTE REGULATIONS—CONSTITUTIONALITY.

A state statute requiring railroads to draw the cars of other corporations as well as their own, at reasonable times and for a reasonable compensation, to be agreed upon by the parties or fixed by the railroad commissioner, does not conflict with the constitutional provision that congress shall have power to regulate commerce between the states.

#### On Motion to Dismiss.

This was an action by a car-coupler in the employ of defendant to recover for personal injuries sustained by him in coupling two freight cars at the Grand Trunk Junction in this city; one of which cars belonged to the defendant, and the other to some other road, being what is termed a "foreign car." This foreign car differed in construction from those used by the defendant, in having what is known as a "platform dead-wood," and, it was claimed, was not only much more dangerous in its original construction, but was out of repair, and that defendant's inspectors were guilty of negligence in permitting it to pass over the road. The declaration described the plaintiff as a resident and citizen of the eastern district of Michigan, and the defendant as an alien. Upon the trial, however, it appeared that the plain-

tiff himself was also an alien, and the defendant immediately moved that the action be dismissed for want of jurisdiction.

*D. E. Prescott* and *John D. Conely*, for plaintiff.

*H. H. Swan* and *Henry Russell*, for defendant.

BROWN, D. J. That this court has no jurisdiction of controversies between aliens, either under the judiciary act of 1789 or the act of 1875, is admitted. Prior to the act of 1875, however, advantage could be taken of the want of requisite citizenship only by plea in abatement; if the defendant pleaded to the merits, the jurisdiction was admitted. *Smith v. Kernochan*, 7 How. 198; *Sheppard v. Graves*, 14 How. 505; *De Sobry v. Nicholson*, 3 Wall. 420. While the jurisdiction of the circuit courts is considerably enlarged by the first section of the act of 1875, and apparently extended to the utmost constitutional limit, section 5 vests these courts with a summary power to stop proceedings and dismiss a suit, whenever it shall appear that it does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable by such court. The salutary nature of this provision is not open to question. It is notorious that claims have been enlarged or collusively assigned to non-resident plaintiffs, and fictitious domiciles established, for the express purpose of clothing the circuit court with jurisdiction of cases which had no proper place upon its dockets. Frequently this fraud upon the court passed undiscovered until the trial had been begun, and it was too late to take advantage of it. This section was admirably designed to strike at the root of these covert attempts to confer jurisdiction. While it has been the practice in this district, even since the act of 1875, to plead the want of proper citizenship in abatement, it is clear, from the opinion of the supreme court in *Williams v. Nottawa*, 104 U. S. 209, that this is no longer necessary, and that it is the duty of the court, of its own motion, to dismiss the suit the moment the want of jurisdiction is made evident. Thus, if it should appear that the plaintiff and defendant were both aliens, or citizens of the same state, or that the plaintiff, at the time suit was commenced, must have known that the amount of his recovery would be less than \$500, I apprehend it is the duty of the court to dismiss; although if he had sued in good faith to recover more than \$500, the fact that the verdict for a less sum was obtained would not deprive the court of jurisdiction, and would only affect his right to costs.

As it is not disputed in this case that both parties are aliens, the suit must be dismissed.

(Plaintiff thereupon moved for leave to amend his declaration by averring in substance that the defective car belonged to a foreign corporation; that such car was loaded outside of the state, and was in the course of transmission through the state to its place of destination. He further averred that there was a state statute in force at the time of the accident which provided that every corporation owning a road in use was at reasonable times, and for a reasonable compensation, to be fixed by the parties or the railroad commissioner, compelled to draw the merchandise and cars of another corporation; that since the passing of such statute two decisions have been rendered by the supreme court of the state which held that by reason of said statute the duty of the company in the reception of such car was only to furnish competent inspectors. He further averred that said statute, as construed by said supreme court, is in conflict with the provision of the constitution of the United States that congress shall have power to regulate commerce with foreign nations and among the several states.)

The object of this amendment is evidently an endeavor to raise a question under the constitution and laws of the United States, and thus create a case cognizable by this court under the first section of the act of 1875. It seems to me there can be no question that it was the intention of congress in enacting this section to permit the plaintiff to resort to the federal courts in every case involving over \$500 in amount, and arising under the constitution or laws of the United States, notwithstanding the defendant may be a citizen of the same state, and thereby to obviate the necessity which had previously existed of suing in the state court, and finally raising the federal question upon writ of error from the supreme court of the United States to the supreme court of the state. *Sawyer v. Concordia*, 12 FED. REP. 754.

Whether, if this amendment had been originally incorporated into the declaration, it would have raised the federal question, it is unnecessary to decide, for I am clearly of the opinion that where the discretion of the court is invoked to permit such an amendment, we are at liberty to examine and to determine the point whether it will be likely to avail the plaintiff. The proposed amendment contains in substance an averment that the supreme court of this state has construed a state statute, requiring railroad corporations of this state to draw cars of other corporations, as relieving such roads from

any further obligation with respect to the running condition of such cars, than to provide competent inspectors to see that they are in order, and that such statute, as so construed, is in conflict with the constitutional provision that congress shall have the power to regulate commerce with foreign nations and among the several states. But clearly these rulings of the supreme court are not constructions of the statute, and hence are not binding upon this court. They are mere definitions of the duties of a railroad corporation receiving cars which they are compelled to transport under the statute. This is a ruling upon a general question of law, and not obligatory upon this court. To construe a statute or other writing is to determine the meaning of the words used. It is obvious that the supreme court was not called upon to do this in the cases referred to.

And, again, it is equally clear that the statute in question does not conflict with the constitutional provision, since nothing is better settled than that the state legislatures may lawfully regulate commerce passing through their territory, when such regulations do not conflict with any congressional enactment. Thus, in the *Railroad Co. v. Fuller*, 17 Wall. 560, it was held that a state statute requiring railroads to fix their rates for transportation of passengers and freight, and to cause a printed copy of such rates to be posted up at all their stations along the line, was a mere police regulation, and did not conflict with an act of congress authorizing railroads to receive compensation for the transportation of passengers and merchandise over their lines. It was stated by Mr. Justice SWAYNE to be such an act as forms "a portion of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states themselves." See, also, *C., B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Munn v. Illinois*, 94 U. S. 113; *Sherlock v. Alling*, 93 U. S. 99-104.

In all such cases respecting commerce between different states the state legislatures may act, and their statutes are valid so long as congress does not see fit to legislate upon the subject, and supersede the statutes of the state by enactments of its own.

The motion for leave to amend must be denied, and the case dismissed; with costs.



## ANDERSON v. LINE.\*

(Circuit Court, E. D. Pennsylvania. November 30, 1880.)

**MARRIED WOMAN—LIABILITY OF, AS STOCKHOLDER IN NATIONAL BANK.**

A married woman who owns stock in a national bank is not exempt, on account of her coverture, from the liability imposed by the national currency acts upon all stockholders in such banks.

Motion for New Trial and for judgment *non obstante veredicto*.

This was an action by a receiver of a national bank against Jesse M. Line and Mary S. Line, his wife, to recover an assessment levied by the comptroller of the currency upon the stockholders of such bank. On the trial it appeared that the stock was owned by Mary S. Line, and that she was a married woman at the time it was transferred to her. The court directed a verdict for plaintiff, reserving the following point:

"Whether the defendant, Mary S. Line, having been a married woman at the time the shares of capital stock in the First National Bank of Allentown were transferred to her, and ever since, was, notwithstanding her coverture, capable of engaging in the undertaking averred, and liable as a shareholder of the said bank in the manner and form in which she is sought to be charged."

Defendant moved for a new trial and for judgment on the point reserved.

Preston K. Erdman and John Rupp, for motion.

John K. Valentine, U. S. Dist. Atty., *contra*.

On April 28, 1880, the following opinion was delivered by—

McKENNAN, C. J. The right of the plaintiff to recover was resisted upon the ground that the real defendant was a married woman, and was not, therefore, liable. The question of her liability was reserved by the court. She was sued as a married woman by reason of her ownership as such of stock in a national bank, transferred to her by her husband, and a certificate for which was obtained for, delivered to, and held by her.

The court being of opinion that her coverture does not exempt her from the liability imposed by the national currency acts upon all stockholders in national banks, therefore decide the question reserved against the defendant and in favor of the plaintiff, and order judgment to be entered on the verdict in favor of the plaintiff.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

On May 1, 1880, the court opened the above judgment, and the case was subsequently reargued.

On November 30, 1880, the court again entered judgment in favor of plaintiff, but without delivering any opinion.

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MARSH, PRICE & Co. v. CLARK.\*

(Circuit Court, S. D. Georgia. October, 1882.)

1. HUSBAND AND WIFE—LIABILITY OF WIFE.

Where it was shown by the evidence that the wife had a separate estate; carried on the plantation for which supplies were bought; shipped the crop with her own marks; the credit was given to her; the accounts were kept in her name; the husband was absent on other business, and was without property and means,—the jury were justified in finding a verdict against the wife.

2. SAME.

In order to find a verdict in such a case against the wife, the jury must be satisfied that the debt for which the note sued upon was given, was contracted for the benefit of her separate estate.

*J. K. Hines*, for plaintiffs.

*Lyons & Gresham*, for defendant.

PARDEE, C. J. The suit is on a draft drawn and indorsed by defendant. The pleas are the general issue, want of protest, and notice, and that the defendant is a married woman, and that the draft was given to pay a debt of the husband. The case submitted to the jury was on the last-named plea.

As to whether defendant had a separate estate to be charged, no issue was made. The presumption of law, under the circumstances attendant upon the drawing of the draft sued on, was that she had such separate estate, (see *Huff v. Wright*, 39 Ga. 41; *Wilcoxson v. State*, 60 Ga. 184;) and if it were necessary to be proved, then I am inclined to think the fact is established by the evidence.

On the question actually in issue and submitted to the jury, as to whether the draft sued on was given by defendant to pay a debt of the husband, the evidence is conflicting. The jury found against the plea. There was certainly evidence submitted to the jury which, if credited by them, was sufficient to warrant this finding. I am not sure but that if I had been a member of the jury, and unacquainted

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

with any reason to doubt the testimony of plaintiffs' witnesses, I would have so found myself. The wife had a separate estate; she carried on the plantation for which supplies were bought; she shipped the crop with her own marks; the credit was given to her; the accounts were kept in her name; the husband was absent on other business, and was without property and means. Under this proof it is easy to see how the jury refused to find that the husband carried on the place, with his wife as agent, and that the debt contracted for supplies was the husband's debt, which the wife gave the draft to pay. But be this as it may, the verdict of the jury on the issue submitted was supported by evidence, and cannot be said to be either against the law or the evidence.

Nor can the verdict be said to be against the charge of the judge, given in these words: "Unless you are satisfied that the debt for which this paper was given was contracted for the benefit of the separate estate of the defendant, who is a married woman, which latter fact is not controverted, you should find for the defendant." Undoubtedly the jury was satisfied that the debt was contracted for the benefit of the separate estate of the defendant, for there was evidence submitted which, if credited, tended to show that fact. This case turned on a question of fact, and came within the province of the jury. There is evidence to support the finding; the verdict ought not to be disturbed by the court. The motion for a new trial will be overruled.

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PAINE v. NORTHERN PAC. R. CO.\*

(Circuit Court, D. Minnesota. December Term, 1882.)

TRESPASS FOR CUTTING TIMBER—INSUFFICIENT DEFENSE.

In a suit by the owner of land for damages for timber cut thereon by the licensee of the vendor, and for the vendor's use, the unrevoked parol license given by the vendor prior to the purchase by complainant is no defense.

Motion for New Trial.

*Ensign & Cash and Wilson & Lawrence*, for plaintiff.

*W. P. Clough*, for defendant.

NELSON, D. J., (*orally*.) A bill of exceptions was settled and signed for the purpose of allowing a writ of error to the supreme court of the United States. A motion is made by the defendant, the Northern Pacific Railroad Company, for a new trial. Suit was brought by Paine

\*Affirmed. See 7 Sup. Ct. Rep. 323.

against the Northern Pacific Railroad Company to recover the value of a large amount of timber that was cut upon land owned by plaintiff and sold to him by the Northern Pacific Railroad Company.

The principal defense set up by the Northern Pacific Railroad Company is that before they sold to Paine a parol license was given to the Knife Falls Water-power Company to cut upon this specific property, the latter agreeing to cut timber to a certain amount, and deliver to the former at a certain price. The Knife Falls Water-power Company went upon this land and cut the timber. Subsequent to this parol license the land was sold unconditionally to Paine. There is no question but that the timber was cut upon Paine's land after he purchased the property unconditionally. The defense is that this parol license previously given to the Knife Falls Water-power Company was never revoked, and, that being so, it was a defense in this suit of Paine against the railroad company to recover the value of the timber.

I held on the trial that such parol license was no defense to this action.

A writ of error will be allowed, and the case may go to the supreme court upon the bill of exceptions as settled and signed.

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### THE FLORENCE P. HALL.

(District Court, S. D. New York. December 8, 1882.)

#### 1. COLLISION—INEVITABLE ACCIDENT—BURDEN OF PROOF.

Where, in case of a collision at sea at night, the defense of inevitable accident is raised, and the main issue is whether the weather was such that the lights of one vessel could be seen in time by the other to enable her by due nautical skill to keep out of the way, *held*, that the burden of proof is upon libelants to show, not only that their lights were burning, but also that the weather was such that they could be seen a sufficient distance to avoid the collision.

#### 2. CONFLICTING EVIDENCE—CREDIBILITY OF WITNESS.

Where the testimony of witnesses from the two colliding vessels was in irreconcilable conflict as to the condition of the weather, *held*, that superior credit was due to those witnesses who were sustained by collateral evidence concerning the material subsidiary points respecting the force of the wind and time of the commencement of the rain, storm, and gale.

#### 3. COSTS ON DISMISSAL—RULE OF.

Upon contradictory evidence as to the state of the weather, the libel in this case was dismissed on the ground of inevitable accident; but the case being doubtful on the merits, and the claimant's vessel having remained practically in concealment from the libelants for a year after the collision, *held*, that the

dismissal should be without costs, although costs are, in this country, ordinarily allowed on dismissal in cases of inevitable accident, as in other cases, though it is otherwise in England.

**In Admiralty.**

*Beebe, Wilcox & Hobbs*, for libelants.

*A. J. Heath and R. D. Benedict*, for claimants.

BROWN, D. J. The libel in this case was filed by the owners of the schooner *Flying Fish* to recover damages for a collision with the schooner *Florence P. Hall*, at sea, at about 10 p. m., on April 9, 1874, at a point about 15 to 20 miles west of Montauk Point, and about 6 to 8 miles south of Long Island. The *Florence P. Hall* was a two-masted schooner, about 115 feet long, and of 245 tons burden, laden with lumber and laths, and bound from St. John, Nova Scotia, to Philadelphia. The *Flying Fish* was also a two-masted schooner, about 74 feet long, and of 76 tons burden, returning from the South Sea Islands, with seal-skins and oil, light loaded, and bound for New London, Connecticut. At the time of the collision the wind was E. N. E. The *Florence P. Hall* was sailing wing-and-wing, with the wind dead aft, on a course W. S. W., with her mainsail and jibs upon her port side. The *Flying Fish* was sailing close-hauled on her starboard tack, and due north by compass. Each vessel had the proper lights set and burning, and, as is claimed by each, a proper lookout. It is not denied that in ordinary weather it would have been the duty of the *Florence P. Hall* to keep out of the way; and the defense on her part is that the collision was the result of inevitable accident, on account of the thickness of the weather; that as soon as the light of the *Flying Fish* could be seen, when about half a length distant, she immediately ported her helm, but was unable to avoid the *Flying Fish*, which, in a few seconds afterwards, ran into her just abaft the main rigging on the port side. Both vessels were seriously injured by the collision; the stem, bowsprit, and jibs, and the foretop-mast and forestay of the *Flying Fish* were carried away, the foremast loosened so as to sway back and forth, and her hull soon commenced leaking. On the following morning she was picked up by the steamer *Florida* and towed into Providence. The *Florence P. Hall* had a bad hole stove in her hull partly below the water line; the lanyards of her main-rigging on her port side were carried away, and the jaw of the main-boom broken. By putting her upon a port tack, and throwing overboard and shifting part of the cargo, the crew were able to keep her above water by the use of the pumps, and she reached Philadelphia on the 12th.

The libelants claim that the night, though very dark, was a good one for seeing lights; that the wind was moderate, and that there was neither storm nor fog nor rain up to the time of the collision; that the red light of the F. P. Hall was seen by those on board of the Flying Fish at least 20 minutes before the collision, when about four miles distant, and continued to be seen all the time until the accident. This account is substantiated by the master and second mate, who were at the wheel, by the lookout forward, and another seaman who was on deck. They testify that the F. P. Hall bore about two or three points on their starboard bow, and continued on the same bearing until she was at least three lengths distant, when she suddenly ported her helm and swung to starboard, with her hull distinctly in view, from half a minute to a minute before the collision, so as to pass their bow; and that the Flying Fish kept on her course unchanged until they struck.

On the part of the Florence P. Hall, the captain, who was at the wheel, the first and second mates, and one seaman, testify that the weather was so thick with rain, snow, and sleet that a vessel's light could not be seen more than half her length distant; that the light of the Flying Fish was reported by the lookout when about that distance off their port bow, and as soon as it was visible; that the fog-horn was put in the hands of the lookout at about 9 p. m., when it shut down thick; and that the horn was blown by him every two minutes or oftener—some of the witnesses say every few seconds—from that time until the collision. The witnesses from the Flying Fish say that no horn was heard by them; that they used none, and that none was needed, as the night was a good one for seeing lights, and that there was no rain nor storm nor thick weather at all, until from 1 to 3 o'clock at night. The lookout of the F. P. Hall was not called as a witness, as he could not be found after this suit was commenced, which was about a year after the collision, owing, as alleged, to the inability of the libelants to discover the other colliding vessel sooner.

In this conflict of evidence each side sought confirmation of its own story from other vessels passing in the region of the collision the same night, and also from the weather bureau, signal stations, and light-houses on this part of the Atlantic coast. From this evidence I regard the following facts as established: That the eighth of April was marked by a thick fog, with light winds, prevailing generally in all this region; at the same time a north-east storm was approaching from the south-west. Early in the evening of the 9th this storm began to be sensibly felt in this vicinity. At 7 p. m. the

weather entry at the New York station was, "Weather *thick with rain and fog*; wind N. E. in strong gusts; 9 P. M., N. E., 22 miles per hour; 9:30 P. M., 25 miles, (a common gale;) at 1 A. M. of the 10th, the storm at its height—the wind 36 miles." At Sandy Hook, "Light rain; ends at 5:40 P. M. of the 9th; began again at 9:40 P. M.;" wind at "9 P. M., 23, and at 11, 34 miles;" no fog noted. At Block Island, "April 9th, wind fresh, with fog and rain; fog signal not used after 2 A. M." At Montauk Point, "April 9th, weather rainy at 9 P. M. and wind 25 miles." At Shinnicock station, "April 9th, commences with fog and rain; the middle and latter part the same." At New London, April 9th, "Light rain; ends 5:30 P. M.; heavy rain begins 9:55 P. M."

Each side also called witnesses from two steamers—the libelants, from the *Holsatia* and *Florida*; and the claimants, from the *Saxon* and the *Aries*. The *Holsatia* was on her voyage from Europe to New York, and at 10 o'clock, the time of the collision, was, as near as I can judge from the testimony, about 30 miles to the eastward. The other three vessels were between Montauk and Barnegat; the *Saxon*, between 30 and 40 miles distant from the place of collision to the south-west; the other two vessels somewhat further distant in the same direction. Copies of the logs of all these vessels were put in evidence, except that of the *Florida*, which could not be found. One witness was examined from each vessel; but as their testimony was taken nearly five years after the collision, less reliance is to be placed upon it where not sustained by the entries in the log, or by other circumstances calculated to impress upon the mind the particulars of that trip.

The log of the *Saxon* notes on the 9th, at "7:30 A. M., (when off Nantucket,) wind N. N. E., brisk; thick fog and rain, having seen nothing since 5 P. M. yesterday; strong N. N. E. gales throughout the middle and latter part of this day. April 10th, 3 A. M., strong gales; Barnegat N. N. W., 25 miles, dead reckoning; April 10th, at 8:40 A. M., wind N., fog cleared away." Her captain testifies that at 9 P. M. on April 9th, he was about 40 miles off Shinnicock; that the weather was then very thick and squally—at times could not see the length of the vessel; from 9 to 12 P. M. could see about three or four hundred yards—sometimes more, sometimes much less than that; that he narrowly escaped running into one vessel about that time of night on account of the thick weather; and that he sounded his fog-whistle constantly during the thick spells.

The log of the *Aries* notes on the 9th: "P. M., cloudy and rain;

8 P. M., fresh gales, E. N. E., with heavy head sea; midnight, fresh gales—rainy.”

The log of the *Holsatia* is extremely meager for the whole voyage. For the 9th it is only, “Moderate breeze—much rain; 7:30 P. M., took pilot.” The pilot “thinks” there was no fog. He says it was rainy, and that the weather was not thick. The indistinctness of his memory is, however, shown from his placing the wind from the south-east, a different quarter of his vessel.

The libellant’s witness Rogers, captain of the *Florida*, who testified without the benefit of his log, or any written *memoranda* of the voyage, says the weather was not thick; but he says the gale was at its height at midnight, April 9th, and that he ran that night at half speed. The claimant’s witness Sawyer testifies that Rogers told him, a few months before his testimony, that he slowed on account of thick weather and fog. Rogers denied this upon the trial, and testified that he told him he slowed on account of the heavy sea. He also testified that he picked up the *Flying Fish* at about 7 A. M. of the 10th, and that the mate told him that at the time of the collision they were standing off shore. He must have been incorrect in this, as the *Flying Fish* was at the time standing directly towards the shore; and the other witnesses also testify that they were picked up at about 10 o’clock instead of 7.

The mate of the *Aries* testified that the weather was very thick all that night; that the fog-whistle was blowing constantly; that his watch ended at 8 P. M., but he remained on deck an hour and a half afterwards, because he did not feel safe.

From this evidence it is clear that the storm had fully set in all the way from New York to Montauk Point, and that it was blowing a gale over this whole region, between 9 and 10 P. M. of April 9th; that the weather was rainy, and more or less thick, varying somewhat in these respects at different times and at different places over this area. All the testimony from this collateral source agrees that the gale had begun and that it was blowing heavily long before midnight. The time of the commencement of the storm and of the rainy weather, are material circumstances in connection with the disputed issue as to the thickness of the weather. All the witnesses from the *Flying Fish* are shown to be grossly incorrect in these particulars. They say the wind at the time of the collision was a moderate breeze. Her captain testifies that it did not storm at all before 3 o’clock, nor was there “any rain, fog, or snow, before 3 A.



m., when it came on blowing and commenced to rain, with fog, and grew very rough." Two other witnesses testified that there was none before 1 or 2 A. M.

The testimony of the witnesses from the F. P. Hall, as to these points, is in accordance with the facts which I regard as proved from the collateral evidence above noted. One of her witnesses testifies that he knows it rained, because when he went on deck at about half-past 9 to reef the mainsail, he came up without putting on his oil suit and got wet.

Where there is irreconcilable conflict between witnesses upon the principal point in issue, it is indisputable that superior credit is due to those witnesses whose testimony upon other material points is in accord with facts otherwise proved, rather than to those witnesses whose testimony on those points is shown to be incorrect.

The testimony of the witnesses on board the Flying Fish, as to the wind and rain, and the commencement of the storm, is proved to be so incorrect that superior credit must be given to the witnesses from the F. P. Hall in regard to the main point of the thickness of the weather at the time and place of collision.

Misrepresentation or gross exaggeration is, moreover, far more common and probable than downright fabrication of testimony. The time and distance at which the red light of the F. P. Hall is alleged to have been seen from the Flying Fish, are in my judgment such exaggerations. The testimony of all the witnesses from the F. P. Hall, on the other hand, in regard to the fog-horn being blown by their lookout, if not true, is sheer fabrication. Several of the witnesses who testify to this fact were not connected with the claimants at the time of giving their testimony, and there is no sufficient ground in this case for attributing to them such a piece of fabrication. Probable occasion for the use of the fog-horn is established by the collateral evidence. But if the horn was given to the lookout at 9 o'clock and thenceforward blown, as testified to by all on board, it cannot be supposed that this was done except on account of thick weather, such as in the judgment of the master required the fog signal to be blown.

As evidence that lights could be seen that night, the captain and two witnesses from the Flying Fish testify that after the collision the Flying Fish followed the F. P. Hall right on for about an hour to find out what vessel she was, guided by a light moving on her deck, but was outsailed by her; but I think that the weight to be

attached to these statements is much impaired by the averment in the libel that the Flying Fish by the collision "became unnavigable," and by the testimony of the master that "the collision crippled me so that she was unnavigable and could do nothing with her, and we lay in the trough of the sea," and by testimony to a similar effect from the other two witnesses.

The shortness of time between seeing the light of the Flying Fish and the collision and of the distance of the two vessels apart, are probably somewhat exaggerated by those on board the F. P. Hall. All except the cook say it was but from three to five seconds in time, and half the schooner's length in distance. Two circumstances seem to show that each was considerably greater. The first mate was standing near the mainmast when the light of the Flying Fish was reported. The captain immediately ported his helm. This caused the foresail to be taken aback and to gibe over to the larboard side; whereupon the mate, as he testifies, ran forward to cast off the guy, and he was just getting down from the deck-load forward (which was six feet high) when the vessels struck. All this could scarcely have taken place in less than half a minute. Again, the cook, who was below, heard the cry, "Light, ho! Hard a-port; she will run into us." He immediately got up, put on his oil suit, and had just got on deck when the collision came. He estimates this took 15 or 20 seconds; half a minute is probably more nearly correct. The vessels were approaching each other at the rate of about 12 miles per hour, as the Flying Fish was sailing at the rate of about 8 knots, and the F. P. Hall at about 6 knots, (her mainsail being nearly down,) upon lines converging at an angle of about 112 deg.; so that, if half a minute elapsed after the light of the Flying Fish was seen before the collision, they must then have been about 500 feet apart; or, if only 15 to 20 seconds intervened, they would have been about 300 feet apart. Either of these distances was altogether too short a space in which to ascertain the exact course of the Flying Fish, so as to determine, and to take, the most certain and effective measures to avoid her. By starboarding, instead of porting, the F. P. Hall might possibly have gone astern of the Flying Fish, as two of the witnesses from the Flying Fish thought she might have done. But as there was not sufficient time or opportunity to wait and observe the course of the Flying Fish before endeavoring to clear her, it cannot be set down as a fault in the F. P. Hall, where instantaneous action was required, that she did not starboard rather than port, even if the former would

have been better, which is by no means certain. *The John Stuart*, 4 Blatchf. 444. The light of the Flying Fish was between abeam and off the port bow, and porting seemed the safer course. As it was, she very nearly escaped, the point of collision being only some 25 to 30 feet from her stern; and in my judgment there is no question that had she been aided by the Flying Fish's porting at or about the same time, and when the latter's witnesses say they first saw the F. P. Hall porting, both vessels would easily have escaped without injury.

The estimate I have given of the distance at which the light of the Flying Fish was first seen by the F. P. Hall, is supported by the testimony of those on board the Flying Fish as to the time when they saw the F. P. Hall swing to starboard under a port wheel. The captain and first and second mates all testify that they saw her thus swing to starboard when about three times her length distant. The second mate, who was at the wheel, testifies that he saw her hull distinctly, and that she was swinging to starboard, and that both vessels had then more than three lengths to run before the collision, and that the time was about from half a minute to a minute. The captain testifies that he saw her masts passing across his bows about half a minute before the collision. If the hull and masts could be thus plainly seen by them anything like half a minute before the collision, since the course of the F. P. Hall must have been also thereby recognized, (and her course being in fact at that time nearly at right angles to the course of the Flying Fish,) it was inexcusable in the latter not to port her helm immediately on seeing this maneuver of the F. P. Hall. Instead of doing this, they kept straight on, as they testify, and struck nearly a square, right-angled blow. The Flying Fish was a small, sharp vessel, less than half the size of the F. P. Hall. She was light loaded and "minded her helm quickly," and had she ported when her master and officers say they saw and recognized the position and course of the F. P. Hall, she would plainly have made far more to windward than the few feet necessary to pass safely astern of the F. P. Hall. If, therefore, they had thus seen and understood the latter's course at the time they say they did, it seems to me very improbable that they would not have then ported. That they did not do so is only explainable upon the supposition that only her light was then made out, and that the course and bearing of the F. P. Hall did not become known to them until afterwards, and only a few moments before the collision; not long enough to enable them to determine with safety upon any change in their course.

Nor can I agree with the libelant's claim that the burden of proof is upon the respondents. Where, as in this case, the defense of inevitable accident is raised, and the pleadings make a direct issue upon the question whether the weather was such that the lights of the libelant's vessel could be seen in time to enable the claimants' vessel, by due nautical skill, to keep out of the way, the burden of proof is upon the libelants to show, not only that their lights were set and burning, but also that the weather was such that they could be seen a sufficient distance to avoid the collision.

The basis of all actions of this character is some fault in the respondents. In the case of *The Morning Light*, 2 Wall. 550, 556, the court say: "Where the collision occurs exclusively from natural causes, and without any fault or negligence of either, the rule of law is that the loss must rest where it fell. The mere fact that one vessel strikes and damages another, does not of itself make her liable for the injury, but the collision must, in some degree, be occasioned by her fault." *The Mabey and Cooper*, 14 Wall. 204, 215; *Butterfield v. Boyd*, 4 Blatchf. 356.

It, therefore, devolves upon the libelant, as a part of his case, to show affirmatively the fact of the respondents' negligence, or the existence of those circumstances and conditions from which negligence is legally inferred. In case of a collision on a dark night, these necessary conditions include proof, not merely that the libelant's vessel had proper lights set and burning, but also that the night was such that the lights were visible at a distance sufficient to enable the other vessel, by due nautical skill, to keep out of the way. Otherwise, no negligence can be inferred. Where the issue of thick weather is raised, I think there is no legal presumption of fact concerning it, one way or the other; or that the weather was clear, rather than thick. It is a pure question of fact, to be determined upon the evidence, before any negligence can be legally attributed to either party, and the burden of proving it falls, necessarily, therefore, upon the libelants. The seventeenth and twenty-third rules of navigation do not affect this question. They were not intended as rules of evidence, or designed to change the burden of proof, or to create any presumption of fault in one party rather than in the other; but only to establish guides for navigation under conditions where the observance of these rules is possible. Rule 24, moreover, shows that all the previous rules are intended to be qualified by the existence of any special circumstances or dangers of navigation. In those cases where it has been held that the burden of proof was upon the steamer, or

the vessel sailing with the wind free, to excuse herself for not keeping out of the way, either there was no question concerning proper lights and the clearness of the night, or else the position of the sailing vessel was known, and negligence was, therefore, a legal inference from the other facts proved. *Leavitt v. Jewett*, 11 Blatchf. 419; *The City of New York*, 8 Blatchf. 194. But where the condition of the weather is in issue, there can be no inference of negligence in not "keeping out of the way," until that issue is determined; and the burden of proof is, I think, with the libelant. *The Roman*, 14 FED. REP. 61. If, however, I am in error on this point, I must hold, for the reasons previously stated, that superior credit is due to the witnesses of the F. P. Hall as to the thickness of the night at the time and place of collision, and that the libel should, therefore, be dismissed.

I have not overlooked certain circumstances attending the case of the F. P. Hall calculated to raise suspicions concerning the good faith of her defense; namely, the failure to call her lookout as a witness, which is explained as above stated; and, *secondly*, the failure of her owners to communicate with the libelants, when, shortly after the collision, they had notice that the Flying Fish had been towed into Providence from a collision that night. The respondents could hardly have been misled by the erroneous statement in the newspapers that the vessel colliding with the Flying Fish was a three-masted schooner instead of a two-masted one, considering their defense of the darkness of the night; and they remained practically in concealment from the libelants for nearly a year, until accidentally discovered, when this suit was at once commenced.

While communication with the other injured party in such cases would seem to be the natural, frank, and honorable course, it was, nevertheless, no legal duty. And if the facts concerning the weather are as I have found them, then the danger of misrepresentation of the facts by those on board the other vessel, and the hazards of a long legal controversy, which this case illustrates, go far to excuse, if they do not wholly justify, the policy of reticence; while, on the other hand, it is not improbable that this very reticence confirmed the libelant's belief in the respondents' fault; and had the latter communicated at once with the libelants and given their version of the facts, probably less diversity of statement would have arisen, and this long litigation might possibly have been wholly avoided. These circumstances are, therefore, at most, but possible grounds of sus-

picion, and in this case are not sufficient to cause me to withhold from the libelant's witnesses the credit which I have found them entitled to from their general accuracy as confirmed by the collateral testimony.

Since the foregoing was written, my attention has been called to several late cases in the English admiralty courts which seem to sustain the views above expressed as to the burden of proof upon the plea of inevitable accident, (*The Marpesia*, L. R. 4 P. C. 212, 219; *The Benmore*, L. R. 4 Ad. & Ec. 132; *The Abraham*, 2 Asp. Mar. Cas. N. S. 34;) and these cases seem to have been approved by Judge BLATCHFORD, in a late case in the circuit court of this district, (*The L. P. Dayton, etc.*, 18 Blatchf. 411; 4 FED. REP. 834.)

As regards costs, the practice in the English courts of admiralty has been long settled, in cases where the libel is dismissed on the ground of inevitable accident, not to grant costs unless the suit was brought without probable cause. 1 Parsons, Shipp. & Adm. 545; *The Marpesia*, L. R. 4 P. C. 212, 221; *The Itinerant*, 2 W. Rob. 236; *The London*, 1 Brown & L. 82. This practice has not, I think, been generally adopted in this country—certainly not in this district; but costs have been given to the prevailing party, as in ordinary cases. In the case of *The Morning Light*, upon the dismissal of the libel on the ground of inevitable accident, the question of costs was argued before Judge BETTS, in this district, in 1859, and costs were allowed by him against the libelants, and the decree was affirmed in the circuit, and afterwards in the supreme court, with costs. 2 Wall. 550. The records in this court also show that in the case of *The John Stuart*, 4 Blatchf. 444, the libel was dismissed "*with costs*," and the decree was affirmed in the circuit. In the case of *Stainback v. Rae*, 14 How. 532, the court below decreed for the libelants. The supreme court reversed the decree on the ground of inevitable accident, and directed a decree dismissing the libel, with costs. As both the inferior courts in that case had decided in favor of the libelants, it could not be said that there was not strong reasonable ground for the suit; nevertheless, on reversal, the supreme court awarded costs against the libelant. See *Arbo v. Brown*, 9 FED. REP. 318.

The present case, however, has, upon long consideration, seemed to me so difficult and doubtful upon all the testimony, and the course of the claimants in keeping themselves unknown and in practical concealment from the libelants having so naturally tended to confirm

the owners of the Flying Fish in their belief that the F. P. Hall was in fault, that I deem it more just, in this instance, to withhold costs. *The Rhode Island*, 8 Ben. 50.

Libel dismissed.

### CARR v. AUSTIN & N. W. R. Co. and another.\*

(Circuit Court, E. D. Texas. November, 1882.)

#### 1. CHARTER-PARTY—LIGHTERAGE.

Where a charter party provides that "the cargo is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, etc., and being so loaded shall therewith proceed," etc., the cost of lighterage at the ports of both departure and destination, for lading and discharge of the cargo, is at the expense of the merchant.

#### 2. PRIMAĞE—VARIANCE BETWEEN CHARTER-PARTY AND BILL OF LADING.

The charter-party being the contract between the parties, and that making no mention of primağe, none can be allowed, although it was stipulated for in the bill of lading. Primağe is no longer a gratuity to the master, unless so expressly stipulated, but belongs to the owners or freighters, and is but an increase of the freight rate. The charter-party having fixed the rate of freight, the bill of lading given thereunder cannot enhance it.

#### COSTS.

Costs of the district court should be borne by the claimants; but as the decree of that court has been reduced, costs on appeal should be borne by the appellee.

In Admiralty.

*Mr. McLemore*, for libellant.

*Mr. Waul*, for claimants.

PARDEE, C. J. The facts of the case are substantially as propounded in the libel and amended libel; the amount due for freight being the only material fact overstated,—£956 5s. 4d. being the true amount unpaid, and not £1,080 11s. 11d. as claimed. Besides this fact, the only other fact contested is whether or not Post, Martin & Co. (claimants and assignees of the bill of lading) had notice of the charter-party in pursuance of which the bill of lading was issued. The evidence on this point is sufficient to establish the fact of notice. Leaving out of the question the recitals on the face of the bill of lading, showing the shipment of an entire cargo of railroad iron, such goods as would be likely to suggest lighterage, and demurrage, etc., the two facts undisputed and unexplained,—(1) of the prepayment of one-half of the freight, less interest and insurance indorsed on the back of the bill of lading; (2) and of the consignee's instructions to his

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

agent prior to the arrival of the ship to furnish lighterage,—taken with the fact that lighterage was furnished by the claimant without question, are sufficient to satisfy me that the claimant, who thus carried out the specifications of the charter-party in advance, must have had notice of its existence and terms.

On the construction of the charter-party there is only one question raised, and that is whether, under its provisions, the consignees were required to furnish lighterage, if necessary, at the port of destination. The clause in the charter-party in relation to lighterage is in these words:

“That the said ship, being tight, stanch, and strong, and every way fitted for the voyage, shall, with all possible dispatch, sail and proceed to Middleboro-on-Tees, where ordered by the charterers, but where she can lay always afloat, or so near thereto as she may safely get, and there load from the factors of affreighters a full and complete cargo of rails, say 1,700 to 1,800 tons, at owner's option, not exceeding 30 feet in length, *which is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, etc.*, and being so loaded shall therewith proceed to Galveston bay, or so near thereto as she may safely get,” etc.

A plausible argument is made that the lighterage therein referred to relates only to the lighterage necessary to take the cargo on board, and not to the lighterage that might be necessary in discharging cargo. It would have been strange indeed if the parties, in making a charter-party with as many details as this one under consideration has, and when contracting specifically in relation to lighterage, had been silent as to that question, leaving it to custom when contracting for a cargo of railroad iron to the port of Galveston, where lighterage is so notoriously necessary. But I cannot take the narrow view of the clause in question claimed for it by the learned proctor. It is stipulated that the cargo “is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship.” The construction claimed would leave the words “and taken from along-side” absolute surplusage, or would render it necessary to hold that when the merchant brought the cargo to the ship, it was to be taken aboard and loaded at merchant's risk and expense, which was, obviously, not the intent nor contract of the parties.

On the question of primage, which has been argued and seems to have been allowed in the district court, I find it is only claimed in the libel in the guise of freight, although specified in the bill attached to the libel as primage. The charter-party, as has been found, constituted the contract between the parties, and as that makes no men-



tion of primage, none can be allowed, although it was stipulated in the bill of lading.

Primage is no longer a gratuity to the master, unless specially stipulated; but it belongs to the owners or freighters, and is nothing but an increase of the freight rate.

The charter-party fixes the rate for freight, and the bill of lading given thereunder cannot enhance it.

The case, then, as it appears to me, entitles the libelant to a decree in his favor for the following amounts, to-wit: For half freight money, unpaid, £956 5s. 4d.; reduced to United States currency, at \$4.80, agreed rate; making \$4,590.08, with interest thereon from January 9, 1882, at 6 per cent. For five days' demurrage, at £35 per day, or £175; reduced to United States currency, at \$4.80, agreed rate; making \$840, with interest thereon at 6 per cent. from January 13, 1882. For charges paid on freight, in landing and carrying for same, etc., to-wit:

Watchmen, \$28.50 and \$27,	-	-	-	-	-	-	-	\$ 55 50
Wharfage, -	-	-	-	-	-	-	-	75 00
Handling and storing, -	-	-	-	-	-	-	-	250 00
Lighterage, -	-	-	-	-	-	-	-	562 50
Amounting to								<hr/> \$943 00

—Upon which interest at 6 per cent. should be allowed from date of payment, say January 26, 1882, when last payment was made, so far as dates are shown. And as the property libeled, and on which libelant had a lien for his demand, has been released and delivered to the claimants, Post, Martin & Co., on bond to stand in place of the property, the decree should be against the claimants and their sureties on the release bond for the amounts as above found due. The costs of the district court should be borne by the claimants; but as the decree of that court has been reduced, the costs on appeal should be borne by the libelant and appellee.

A decree in accordance with these views will be entered.

## PEDERSEN and others v. EUGSTER &amp; Co.\*

(District Court, E. D. Louisiana. December, 1882.)

## 1. WORKING DAYS.

The expression "working days" has, in commerce and jurisprudence, a settled and definite meaning; it means days as they succeed each other, exclusive of Sundays and holidays.

## 2. CHARTER-PARTY—PAROL EVIDENCE TO CONTRADICT—CUSTOM.

In a written instrument of charter-party, where an unambiguous term is used, and which has an accepted signification, both in commercial and judicial language, proof of usage will not be permitted to show that such term has a local meaning repugnant to its settled sense.

*Edward H. Farrar*, for libelants.

*Samuel P. Blanc* and *Frank N. Butler*, for defendants.

**BILLINGS, D. J.** In this cause the only question submitted is as to the meaning of the words "working days," as used in a charter-party executed in the city of New Orleans. The vessel was chartered for a voyage to Trieste. The charter-party provided "that lay days for loading shall be as follows: If not sooner dispatched, 14 working days, Sundays excepted, for loading; and eight days, Sundays excepted, for discharging at Trieste." The answer admits the allegations of the libel that — days were consumed in lading beyond the lay days allowed in the contract, if only Sundays and holidays are to be excluded in the computation, and avers that by the usage of the port of New Orleans, with reference to cotton-carrying vessels, to which class the chartered vessel belonged, rainy days are also excluded, and that when the days wherein cotton could not be laden on account of the weather are also excluded, the ship's time of loading was within the period allowed by the charter-party.

It is thus seen that the sole question is as to the meaning of the term "working days," and whether that meaning can be varied by parol testimony.

The civil day is the solar day, and is measured by the diurnal revolution of the sun, denoting the interval of time which elapses between the successive transits of the sun over the same hour circle, so that the civil day commences and terminates at midnight.

The expression "working days" has in commerce and jurisprudence a settled and definite meaning; it means days as they succeed each other, exclusive of Sundays and holidays. The court give this precise and formal definition in *Brooks v. Minturn*, 1 Cal. 483. See,

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

also, Bouv. Law Dict. *verbis*, "lay days," and Webst. Dict. under the head "working day."

If the word "days," alone, is used with reference to lay days or days for loading a ship, all the running or successive days are counted. If the term "working days" is used, all days are counted except Sundays and holidays. If the parties wish further to except days when the weather prevents work, they use the expression "weather working days," or "with customary dispatch," or some other expression which clearly indicates the intention to recognize that days of inclemency from winds and storms are also excepted.

Taking into consideration the cycle of years since this term "working days" has received a commercial interpretation, as sanctioned by the judges, and the frequency and universality with which courts have adhered to that interpretation, for parties to use the expression "working days" in a charter-party is to express that, except Sundays and holidays, all days are to be counted, whatever be the state of the weather.

Now, to admit evidence that at the port of New Orleans any usage prevails which would vary this legally-ascertained definition, would be to admit parol evidence to contradict a written contract.

I am aware that in the many cases in which courts have been called upon to limit the admission of parol to affect written evidence, some may be found where the premises have not been sufficiently scrutinized, and thus laxity will be found in the conclusion, and where, therefore, a proper exception has been allowed to obliterate one of the most salutary rules of evidence. But the best-considered and most-discriminating cases, and the commentators of highest repute, establish, in the language of Chancellor (then Chief Justice) KENT, in *Frith v. Barker*, 2 Johns. 335, that "usage ought never to be received to contradict a settled rule of law." *Homer v. Dorr*, 10 Mass. 26. Phillips, in his treatise on Evidence, page 436, (marginal paging,) says: "Where the legal effect of an instrument or of the terms in it has been settled, no evidence of commercial usage is admissible." To same effect see Starkie, Ev. pt. 4, pp. 1036, 1038. In *Angomar v. Wilson*, 12 La. Ann. 857, our own supreme court excluded testimony as to the meaning of the term "household furniture," on the ground that "there was no ambiguity in the expression." In *Woodruff v. Merchants' Bank*, 25 Wend. 674, affirmed in the court of errors, (S. C. 6 Hill, 174,) parol evidence of usage, to show that days of grace were not allowed upon an order upon a bank to pay to the order of A. B., on such a day, a certain sum of money, was excluded;

the court, through Judge NELSON, saying that "the effect of the proof of usage as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York." The doctrine is adhered to in *Bowen v. Newell*, 8 N. Y. 194.

The case presented is this: In a written agreement, parties have used a term which is unambiguous, and which has an accepted signification, both in commercial and judicial language. Proof of usage is sought to be introduced to show that in the very respect in which this term had its origin and has had its world-wide employment, it has a local meaning repugnant to its settled sense. To permit this would be to introduce ambiguity where none exists, and defeat the clearly-expressed intent of a written contract.

There must be judgment for the libelant upon the answer of the defendants.

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### THE CAROLINA.\*

#### FRY v. COOK and others.\*

(District Court, D. Louisiana. April, 1876.)

#### 1. ARREST IN ADMIRALTY.

The limitation in the statutes of the United States and the rules of the supreme court, allowing arrests in civil causes by virtue of a process from a court of the United States only in cases in which an arrest is authorized by the laws of the state in which such court was sitting, applies to admiralty as well as to common-law processes.

#### 2. ADMIRALTY JURISDICTION.

In the absence of circumstances showing cruelty or great hardship, the admiralty courts of the United States cannot be required or allow themselves to entertain jurisdiction of a case where subjects of a foreign government invoke their assistance against a merchant vessel of a foreign government.

*R. H. Shannon*, for libelant.

*Edward M. Hudson* and *J. Walker Fearn*, for respondents.

**BILLINGS, D. J.** This is an action brought to recover damages for assault and battery, alleged to have been committed on the high seas. An order of arrest was at first issued, which, on argument, was vacated, on the grounds that the statutes of the United States and the rules of the supreme court allowed an arrest by virtue of a process from a court of the United States only in cases in which an arrest is authorized by the laws of the state in which such court was sit-

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ting; that this limitation applied to admiralty as well as to common-law processes; and that according to the laws of the state of Louisiana the body of a non-resident could not be taken on any mesne process unless he was an absconding debtor.

The case is now before me on an exception to the exercise of jurisdiction on the part of this court. I have directed testimony to be taken summarily before the commissioner on the merits, so that all the facts are before me. The question is, ought this court, from a regard to the commerce of a friendly government, to refrain from granting relief? It appears that the libellant is a foreigner, and a seaman on a British vessel, upon which the beating is alleged to have been inflicted, he having shipped in Liverpool for the round voyage to this country and back, and upon that voyage having arrived at the port of New Orleans; that the defendants are all British subjects. The British consul resident at this port, having been notified, came before me and, in behalf of his government, remonstrated against this court taking cognizance of the cause.

Independently of the considerations which arise from the nationality of the parties and vessel, the weight of evidence is against the libellant. But, as these considerations have been so fully and ably presented, I will avail myself of the aid which the proctors have rendered, and state my conclusion as to the duty of courts in exercising or withholding jurisdiction in such cases. It is undoubtedly true, as a general proposition, that an action for a personal tort follows the person, and may be brought in any foreign court. It is also true that the courts of a nation are established and maintained for the convenience of its own citizens or subjects, and if foreigners are permitted to become actors therein, it is because of what is termed comity between nations. *American Law Review*, vol. 7, p 417, and *Daniel Webster's Works*, (Everett's Edition) vol. 6, pp. 117, 118. The only ground upon which a foreigner could urge a claim to become a libellant in our courts would be that it was by comity due his government that its subjects should be thus heard, and, so far as this claim could be considered as a right, it could be insisted on only by that government, and, except in cases of inhumanity or gross injustice, would disappear whenever the claimant's government took a position against it.

There is in this case no circumstance such as the unwarranted termination of the voyage, the discharge of a seaman, or brutality, which might possibly constitute a proper ground for the interposition of the jurisdiction of a foreign court without the request of the representa-

tive of libelant's government. It is a suit brought by a foreigner springing out of a voyage on the ship of a friendly nation, in the midst of that voyage, against the subjects of that nation, on account of alleged grievances. The libelant not only proposes to disconnect himself from the ship, but asks the detention of ship, officers, and crew in a foreign port, in order to settle a dispute which can far better be settled by the tribunals of the country in which, under whose laws, and in connection with whose commerce, he made his contract, and to which he agreed to return. The representative of that country asks this court not to interfere. It is urged, and that fairly, that by the very agreement of the parties—the articles of shipping—the courts of the kingdom of Great Britain have been made the forum for the settlement of this dispute; that they afford adequate redress; and that for courts to entertain this and similar suits during a voyage which the parties had agreed to make at intermediate points at which the vessel might touch, would impose delays which might seriously and uselessly embarrass the commerce of a friendly power. The exercise of jurisdiction in such a case is discretionary, and, until the congress of the United States controls the subject by legislation, is discretionary with its courts, and should be controlled by precedent if that exist. In this case I am satisfied, by reason and abundant authority, that the court should decline to entertain jurisdiction. *Gienar v. Meyer*, 2 H. Bl. 603; *The Golubchick*, 1 W. Rob. 143; *Gonzales v. Minor*, 2 Wall. Jr., 348; *The Becherdass Ambaidass*, 1 Low. 569; *The Maggie Hammond*, 9 Wall. 435; *One Hundred and Ninety-four Shawls*, Abb. Adm. 317; *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543; and the very able articles on "suits between aliens in the courts of the United States," (7 Amer. Law Rev. 417,) from which a reference to many of the above cases was derived.

Let the libel be dismissed. Let the suit of the same libelant against the British bark *Carolina*, for the same reasons, be dismissed.

See *The Montapedia*, post, 427.

## THE MONTAPEDIA.\*

(District Court, E. D. Louisiana. November, 1882.)

## 1. MERCHANT SHIPPING ACT—REV. ST. §§ 4501-4512.

The statute of June 7, 1872, (17 St. at Large, p. 262; Rev. St. §§ 4501 to 4512,) does not apply to a British vessel.

## 2. ADMIRALTY JURISDICTION.

In the absence of circumstances showing cruelty or great hardship the admiralty courts of the United States cannot be required or allow themselves to entertain jurisdiction of a case where subjects of a foreign government invoke their assistance against a merchant vessel of another foreign government.

*The Carolina*, (decided April, 1876, ante, 424,) followed.

In Admiralty.

*O. B. Sansum* and *J. B. White*, for libelants.

*J. R. Beckwith* and *J. Walker Fearn*, for claimants.

BILLINGS, D. J. This is a suit instituted by subjects of the empire of China against a British vessel. They were shipped at a port within the United States, namely, at San Francisco, for a voyage which was to occupy three years, and were to be discharged at Hong Kong. The whole question is, does the statute of June 7, 1872, (17 St. 262; Rev. St. at various sections from section 4501-4512,) apply to a British vessel? The conclusion which I have reached is that it does not. The act of June 7, 1872, is, in the provisions which relate to the shipping of seamen, a literal copy of the "Merchant Shipping Act," enacted by the parliament of Great Britain in the year 1854.

In section 160 of the act of the parliament of Great Britain (17 & 18 Vict. c. 104; Digest of Statutes relating to Merchant Shipping, 102) it is enacted that British ships which engage seamen at any place out of her majesty's dominions shall enter into the engagement with the sanction of the British consular officers, and according to that act of parliament. In section 15 of the act of the congress of the United States (17 St. at Large, 265) it is enacted *totidem verbis* that merchant ships of the United States who engage seamen at any place out of the United States shall enter into the engagement with the sanction of the consular officers of the United States, and according to that act of congress. Such an adoption on the part of the United States, in the year 1872, of a statute of Great Britain passed in the year 1854—such a coincidence in the legislation of the two nations—furnishes a guide to the courts of each in the construction of these statutes equivalent to a treaty stipulation; for it cannot be supposed that our government would copy the stat-

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ute of England, and thereby, through its legislation, assert the supremacy of its laws over the manner of the shipment of its seamen in places and under certain circumstances in England, when it was not willing to concede an ascendancy to the laws of England in similar places and under similar circumstances within our own territory. These statutes, then, must be considered as a mutual concession that either nation, in shipping her seamen upon her merchant vessels, was to follow her own laws, even when the shipping was effected within the territory of the other; and it would follow that the act of 1872 could not include in its operation British ships.

The structure of the statute of 1872 brings me to the same conclusion. The title of the statute is "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." The very title limits the action of the shipping commissioners to a superintendence of the shipment on ships belonging to the United States. Now, the only thing complained of here is that there was no such superintendence.

But, again, section 65 of the act of 1872, p. 277, (act 4612 of Rev. St.,) enacts that, within the meaning and for the purposes of that act, a "master" is "a person having command of," and a "seaman" is "a person employed on board of," "a ship belonging to a citizen of the United States."

I think, therefore, the internal structure of the statute also shows that it was intended to operate only upon the manner of shipping crews upon our own vessels.

The case presented is of subjects of a foreign government, invoking the jurisdiction of a court of the United States against a merchant vessel of another foreign government. Independently of the statute of 1872, the case is without any circumstances which would require or allow this court to entertain jurisdiction, (see the opinion rendered by this court *In re The Carolina*, in April, 1876, *ante*, 424,) and that statute does not include this cause.

The decree, therefore, will be that the libel be dismissed.



## THE NORA.\*

*(District Court, E. D. Pennsylvania. December 8, 1882.)*

## 1. SHIPPING—BILL OF LADING—EXCEPTION IN—NEGLIGENCE—SHORTAGE.

Where, by the negligence of the captain, an excessive delivery was made to one consignee and a shortage to another, in a libel by the latter against the vessel, the ship cannot avoid liability by a provision in the bill of lading that weight, contents, and material were unknown.

## 2. SAME—CHARTER-PARTY.

Where the charterer agreed to load with scrap-iron, and did load partly with scrap-steel, and the bill of lading provided that the shipment was subject to the charter-party, and weight, contents, and material were unknown, the vessel is liable to a consignee of a bill of lading for a shortage in the delivery of scrap-steel occasioned by the negligence of the captain.

## 3. SAME—EVIDENCE OF NEGLIGENCE.

That other consignments of scrap-steel were fully delivered, and that the captain declined the assistance of an expert for distinguishing iron from steel, and afterwards made an excessive delivery containing steel to a consignee entitled to iron, are evidence in this case of negligence in making a shortage to a consignee entitled to steel.

In Admiralty. Libel and answer.

Libel filed by Stewart & Co., indorsees of a bill of lading, against the bark Nora, to recover the value of a shortage of 26 tons of steel-scrap.

On April 6, 1880, Sanders Bros. shipped on the bark Nora, at Antwerp, to be carried to Philadelphia, a quantity of steel-scrap, weighing about 200,000 kilos, or 197 tons, and indorsed the bill of lading to libelants. The Nora also carried two other consignments of steel-scrap, of 10 and 24 tons, respectively, and also two other consignments of scrap-iron, of 20 and 267 tons, respectively. The vessel put into Waterford in distress, where she discharged the greater part of her cargo, and reloaded after repairs. After the arrival in Philadelphia, part of libelant's consignment was sent on general order to the warehouse, and after inspection there appeared to be a shortage of 40 tons of scrap-steel. The two other consignments of scrap-steel were fully delivered, but to one of the consignees entitled to scrap-iron there were delivered about 33 tons of scrap-steel, and in all an excess of 26 tons.

The libelants claimed that upon the reloading at Waterford steel and iron had been carelessly mixed, and that upon the arrival of the vessel at Philadelphia the captain had declined the assistance of an ex-

\*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

pert, offered by one of the consignees, for the purpose of distinguishing the metal while discharging.

The respondent denied any negligence in reloading the vessel, and claimed that the charterer had agreed to load with scrap-iron, and trim the same, and upon discovering that the bill of lading, providing that the shipment was subject to the charter-party, called for scrap-steel, the captain declined to sign until the words "weight and material unknown; weight, contents, and value unknown," were added; and also claimed that the libelants had failed to prove the amount of their alleged shipment, or to establish their ownership in the excess delivered to another consignee, which, in appearance, resembled iron, and had been so considered by the government inspector, the master, and the representative of the consignee, who received it.

The respondent also contended that the libelants were merely the agents for Collins & Co., the actual owners of the bill of lading and scrap, and that, therefore, no recovery could be had in the case as brought.

*Alfred Driver and J. Warren Coulston, for libelants.*

*Curtis Tilton and Henry Flanders, for respondent.*

BUTLER, D. J. Under the terms of the bill of lading, the libelants, who are indorsees, must show that the steel claimed was shipped, and that the non-delivery resulted from negligence. The quantity delivered was nearly 157 tons. That the quantity shipped was about 197 tons, is reasonably clear. This is the quantity named in the bill of lading; and although the respondent withheld his assent from this statement, the declaration thus made by the shipper, at the time of loading, is a part of the *res gesta*, and while it may, and doubtless would, be insufficient to establish a *prima facie* case, it is nevertheless evidence, to be considered with other facts tending to prove the actual quantity. The ship contained two other consignments of steel, one of about 20 tons, and the other about 24, and two consignments of scrap-iron, one of about 20 tons, and the other about 267—the bills of lading for which were in all respects similar to that held by the libelants. The aggregate amount of the several consignments, (constituting the entire cargo,) as exhibited by the bills of lading, was therefore, of steel about 231 tons, and of iron about 287 tons. The ascertained weight of the cargo delivered by the ship, corresponds pretty closely with this quantity. While the delivery to the libelants was short from 30 to 40 tons, the delivery to another consignee (Samuels & Co.) was excessive to nearly

an equal amount; and this excess consisted of *steel*, while Samuels & Co. were entitled only to iron. It thus appears that after the other consignees had received all they were entitled to, there remained of the cargo what corresponded in kind, and pretty closely in quantity, with the balance due the libelants, according to their bill of lading and claim. That the steel delivery to Roebling's Sons on the consignment to Samuels & Co., as iron, in excess of the quantity called for in their bill of lading, was the libelant's steel, I have no doubt.

Was this mistaken delivery the result of negligence? If it was, the libel must be sustained; otherwise it must be dismissed. The circumstances under which the cargo was loaded, and the terms of the bill of lading, relieved the ship from the usual strictness of the obligation respecting ascertainment and delivery of consignments. The mixing of steel with iron, as was done, was not provided for by the charter, and necessarily tended to subject the ship to unusual labor and care in making delivery. I have no doubt, however, that officers of the ship had knowledge at the time of what was being done, and no objection appears to have been made until the captain was asked to sign the bills of lading. Although he then complained, and refused to sign until the language was qualified, he undertook, with full knowledge of the facts, to carry the cargo, and thus became responsible for the exercise of such care as the circumstances required, in ascertaining and delivering the several consignments. No fault shown in loading will relieve him from this obligation. Aside from the fact that the loading may be presumed to have been superintended by a representative of the ship, an implied agreement to exercise proper care respecting delivery, arose from the undertaking to carry, after being informed of the circumstances. In view of the fact that the cargo was handled in transit at Waterford, and the confusion of the metals consequently increased, the respondent should be held to a high degree of care. Might the mistake made have been avoided by the exercise of such care? I believe it might. The testimony shows that the consignments of 10 and 24 tons, respectively, of steel, were ascertained and delivered without difficulty; and the same is true of the 20 tons of iron, and the partial delivery of steel to the libelants. No trouble was encountered thus far in distinguishing the two kinds of metal. It is not shown that the steel delivered to Roebling's Sons, as iron, differed from the other, delivered to the libelants. The description of the former by the witnesses does not establish such difference. It seems quite clear that if the captain had not declined the aid of Mr. Alexander, who went

to the ship to assist in distinguishing Samuels & Co.'s iron, the mistake would have been avoided. The sending of this expert to superintend the separation of the metals was additional notice of the necessity for care. The captain, however, asserted entire confidence in his own ability to distinguish the iron from the steel, as also did the mate. And yet he delivered 33 tons of steel on Samuels & Co.'s consignment of iron, 26 tons of which were in excess of the entire amount of metal called for by this consignment. This fact—the delivery of such an excess without inquiry or hesitation—is pregnant with evidence of negligence. The circumstance that he was giving to this party such a quantity of metal more than he was entitled to, while the libelants' delivery was short in an equal or greater amount, should certainly have created apprehension of mistake. Investigation then would have disclosed the fact that he was delivering the libelants' steel to Roebling's Sons, as plainly as it did when subsequently made.

If it were granted that the respondent might, under the charter and bills of lading, have treated the entire cargo as *iron*, and delivered it as such, his position would not be improved. It would still be plain that he should have stopped when Samuels & Co.'s consignment was fully delivered, and placed what remained to the libelant's deficiency.

The fact that the libelants were not present at the delivery does not tend to excuse the respondent.

As indorsees of the bill of lading the libelants have title, and may sue in their own names, as they have done. *The Thames*, 14 Wall. 107, 108.

See *Pollard v. Vinton*, S. C. U. S. 11 FED. REP. 351, and note; *Lindsay v. Cusimano*, 10 FED. REP. 302; *The Bristol*, 6 FED. REP. 638; *Merrick v. Wheat*, 3 FED. REP. 340; *Compart v. The Prior*, 2 FED. REP. 819; *Willis v. The Austin*, Id. 412; *Richards v. Hansen*, 1 FED. REP. 54; *O'Rourke v. Tons of Coal*, Id. 619; *Hall v. Penn. R. Co.* Id. 226; *Muser v. Am. Ex. Co.* Id. 382; *Unnevehr v. The Hindoo*, Id. 627.

## LATHAM and another v. BARNEY and others.

(Circuit Court, D. Minnesota. December Term, 1882.)

## 1. RELEASE TO ADMINISTRATOR, RATIFYING SALE OF LANDS—FAILURE TO RESCIND, CONTRACT VOID—LACHES, ETC.

Decedent, in his life-time, was possessed of a certain interest in lands which he held with others. His acting administrator, who owns a part interest in the same lands, obtains the assent of two of decedent's heirs to the sale of decedent's interest in the said land, and forthwith conveys the same to himself and his associates. Thereafter all decedent's heirs, including the complainants, sign a release discharging him from all liability "on account of the assets and property of the deceased in his possession or under his control." In the suit brought by two of these heirs against the acting administrator and his associates, purchasers of the land aforesaid, asking for an accounting of proceeds of sales made by them, and for a conveyance to complainants of the undivided interest in the lands still unsold, *held*, that the release from the heirs of decedent to the administrator, considered in the light of a sale of their interest in the lands by such acting administrator to himself and associates, or as an agreement ratifying such a sale previously made by him, was wholly invalid, and that this being so, and it not appearing that the complainants accepted any benefit from the sale after the facts were known, they are not estopped to assert the invalidity of the sale by reason of laches, failure to rescind, and the like.

## 2. PROTECTION TO BONA FIDE PURCHASERS.

The protection extended to a *bona fide* purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity.

## In Equity.

On the thirty-first day of October, 1867, a written contract was entered into between Danford N. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel M. Hoyt, and Alfred M. Hoyt, parties of the first part, and the Winona & St. Peter Railroad Company, party of the second part. By this agreement it was recited that the parties of the first part had loaned and advanced to the party of the second part large sums of money, and had made, constructed, and equipped for it 105 miles of its railroad in the state of Minnesota, whereby the said party of the second part had become indebted to the parties of the first part in a large sum of money. The contract also provides for certain payments upon said indebtedness, and for a conveyance of a portion of the land grant owned by the railroad company in settlement of the residue. This latter portion of the contract is as follows:

"Now, for the residue of the said indebtedness of the said party of the second part to the said parties of the first part, the said party of the second part hath agreed to sell and convey to the said parties of the first part as many

acres of land heretofore granted by congress to the state of Minnesota as the said party of the second part shall receive from the said state by reason of the construction of the portion of the Winona & St. Peter Railroad heretofore constructed, to-wit, 105 miles thereof, extending westwardly from Winona, excepting and reserving, nevertheless, any and all parts and parcels of such lands (if any such there be) which may be necessary for the track of said railroad, or the right of way, or any depot or depot grounds thereof, or any other purpose incidental to the operation of the said railroad constructed, or to be constructed, or any part thereof; which said lands hereinbefore agreed to be sold, shall be conveyed to the said parties of the first part, or as they shall in writing direct, whenever and as soon as the said party of the second part shall obtain a title thereto under such acts of congress. The lands to be conveyed as aforesaid shall be selected as follows:

"Beginning at Winona aforesaid, and from thence proceeding on each side of the said railroad on a course running parallel therewith, embracing each of the six, ten, fifteen, and twenty mile limits of the congressional land grants, and in proceeding taking all lands within each and all of said limits which shall be received by the said company under said acts of congress, or either of them; it being understood that on each side of said railroad an uniform line of advance westwardly, embracing all the lands in said limits, shall be maintained, as nearly as may be, until as many acres shall have been selected and taken as the said company shall have received, for the construction of the portion of the said railroad now completed, which is estimated to be 105 miles thereof, extending northerly and westerly from Winona aforesaid; it being understood that the said parties of the first part shall receive as many acres as shall be received by the party of the second part for the construction of the said 105 miles, or so much thereof as is now constructed, notwithstanding that under the acts of congress the said lands are certified only upon the completion of sections of not less than 10 miles of railroad, but reserving, excepting, and deducting from the said number of acres all lands necessary for the track of said railroad, or the right of way, or depots or depot grounds, or other purposes incidental to the operation of said railroad.

"And the said party of the second part agrees to acquire the title of said lands as fast as it may be permitted to do under said acts of congress, and to release and convey to the said parties of the first part, or to such person or persons in such manner and from time to time as may be devised by said parties of the first part, or their counsel, on the request of the said parties of the first part, or a majority of them, and will do any and every other act and thing necessary and proper to secure the said parties of the first part said lands, and every part and parcel thereof, and the proceeds thereof, if it shall be hereafter determined that the same shall be sold by the said party of the second part for the benefit of the said parties of the first part; and until the final arrangements shall be made in reference thereto, the title shall be held by the said party of the second part; and as some time is necessary to enable said parties of the first part to confer and agree upon the details in relation to the holding of the title and the mode of disposing of said lands, this clause is inserted to express the agreement of parties in relation thereto."

There was for a time some uncertainty as to the quantity of land to which the parties of the first part were entitled under this agreement, but all such uncertainty was removed by the decree of this court in the case of *Ashbel H. Barney et al. v. The Winona & St. Peter R. Co.*, which is in evidence, and which shows the number of acres to be 514,266.35½.

After the execution of said contract, and before any conveyance under it had been executed by the railroad company, the above-named Charles F. Latham died seized of an undivided one-thirty-seventh interest in said contract and in the aforesaid lands. The said Charles F. Latham died August 25, 1870, intestate, leaving no father, mother, children, or wife. His next of kin and heirs were nine brothers and sisters, and the children of a deceased sister; but as one of the sisters had received her share of his estate in advance, it is conceded that the property of the estate vested in eight brothers and sisters, and the children of the one sister deceased; the said eight brothers and sisters, and the children aforesaid, being entitled respectively to an undivided one-ninth part thereof. The complainants are two of the brothers of said Charles F. Latham, deceased, and were each entitled at his death to one-ninth interest in his estate. No legal proceedings were ever instituted for the settlement of the estate of said Charles F. Latham, and no administrator was ever appointed; but in accordance with his wish, expressed shortly before his death, and with the consent of the heirs, for the purpose of saving the expense of administration, the defendant Ashbel H. Barney took possession of the assets of the estate, and undertook to distribute them. The estate consisted of a considerable amount of property, mostly personal, in addition to the interest in the land grant acquired under the aforesaid contract, in which latter the defendant Barney held an interest of his own as one of the parties to said contract. Some time after the death of said Latham, two of his sisters and their husbands verbally assented to a sale by defendant Barney of the interest of the estate in the aforesaid lands for the sum of \$10,000, he at the time advising them that it was worth no more. It does not appear that any of the other heirs were consulted.

Prior to the ninth day of September, 1871, the defendant Barney entered into an agreement to sell the interest of the estate of said Charles F. Latham in the aforesaid lands for \$10,000 to the persons who held the remaining interest, viz., the eight persons who, with said Latham, had, by the contracts aforesaid, purchased the same

from the railroad company, the said Barney being one of them. On or about the day last named the defendant Barney caused to be prepared a statement of account between himself and the said estate, and a release to be signed by each of the heirs. A sufficient number of copies of this statement were prepared to provide one copy for each heir and one for said Barney, and they were all sent by express together to each heir to be signed, and, after signing, one executed copy was sent to each. Among the copies of this statement and release was one which differed from the others in a particular to be hereafter stated. All but that one were in the following form:

"Whereas, Charles F. Latham, late of Irvington, county of West Chester and state of New York, died intestate, leaving a considerable estate, consisting of personal property, to be distributed among his next of kin, he, said Latham, having survived his wife and parents, and leaving no children or representative of a child;

"And whereas, the next of kin of said Latham, entitled to participate in the distribution of said estate, for the purpose of saving the delay and expense incidental to legal proceedings to effect such distribution, have agreed among themselves as to the division of said estate, and the amount going to and receivable by each of the next of kin, whether in money, bonds, stock, or other property;

"And whereas, the persons entitled to participate in such distribution, and who have agreed upon the same, are the following, and their respective places of residence: William H. Latham, a brother of deceased, Indianapolis, Indiana; Henry M. Latham, a brother, Thetford, Vermont; James K. S. Latham, a brother, San Francisco, California; Edward P. Latham, a brother, Waseca, Minnesota; Lucy H. Kelly, wife of Thomas M. Kelly, sister of deceased, Cleveland, Ohio; Mary Baker, wife of John G. Baker, a sister, Orange, New Jersey; Julia A. Murphy, wife of Gardner B. Murphy, a sister, Cleveland, Ohio; Sarah A. Stockwell, wife of Nathaniel H. Stockwell, a sister, Orange, New Jersey; Azuba F. Barney, wife of Danford N. Barney, a sister, Irvington, New York; the three children of Arthur Latham, a deceased brother, to-wit, Arthur and Jeanette, of Thetford, Vermont, and Julia A., wife of Francis W. Corey, of Chicago, Illinois, and all of whom are of full age except Arthur, who is herein represented by his mother, Lura A. Latham, who is guardian of his personal estate.

"And whereas, each of the above-named parties—that is to say, the brothers and sisters of the said Charles F. Latham—are entitled to one-tenth of said estate, and the children of Arthur are each entitled to one-third of a tenth thereof; except, whereas, the said Charles F. Latham, in his life-time, advanced to the said Sarah A. Stockwell all that part or portion of his estate to which she would become entitled on his death, and such advancement was accepted and received by her upon the understanding that she would make no claim whatever upon his estate on his death, but would release to the other parties entitled thereto all interest in said estate, to be divided among the others next of kin to said Latham.



"And whereas, it is now the intent to give full force and effect to such understanding: Now, therefore, said Sarah A. Stockwell, in consideration of such advancement, doth hereby release all claim on the estate of said Charles F. Latham, and agrees to distribution of the same among the next of kin, exclusive of herself; that is, to each brother and sister a ninth part thereof, and to each of the children of Arthur Latham one-third of a ninth thereof.

"Now, therefore, in consideration of the premises, and also in consideration of the distribution made to each of us of that part or portion of the estate of the said Charles F. Latham to which we, and each of us, are entitled, as above set forth and declared, the receipt whereof we, and each of us, do hereby acknowledge, we, and each of us, have released, remised, and forever discharged, and do hereby, each for himself, his heirs, his executors, administrators, and assigns, remise, release, and forever discharge the others and each of them, their heirs, executors, and administrators, from all claims and demands for the amount so received by them, and each of them, in his or her distributive share of the estate of the said Charles F. Latham, and from all debts, demands, and actions, and causes of action, growing out of or which may result from the aforesaid distribution.

"And whereas, Ashbel H. Barney, of the city of New York, at the time or subsequent to the death of the said Charles F. Latham, had in his possession, or under his control, certain of the assets and property of the said Charles F. Latham, which he has surrendered and delivered to the next of kin to the said Latham, and which property and assets entered into the aforesaid distribution, and passed to the next of kin:

"Now, this agreement further witnesseth that the said parties hereto, in consideration of the premises, and of the surrender and delivery to the said next of kin of the aforesaid property and assets, have, and each of them hath, released, remised, and discharged, and they and each of them do for himself or for herself, their heirs, executors, and administrators, remise, release, and forever discharge the said Ashbel H. Barney, his heirs, executors, and administrators, of and from all claims, demands, actions, and causes of action on account of the said assets and property of the said Charles F. Latham, so in his possession or under his control.

"In witness whereof the said parties have hereunto set their hands and seals this — day of ———, in the year one thousand and eight hundred and seventy-one."

[Signed by all the heirs, including complainants.]

Sealed and delivered in presence of

Schedule showing the estate of which the late Charles F. Latham died possessed, and the distribution among the next of kin in the foregoing agreement mentioned.

## ESTATE.

	Cash bal. at W. F. & Co.'s,	-	-	-	-	\$ 19,835 70
Dec. 8.	Div. on 300 shares Adams Ex.,	-	-	-	-	600 00
Jan. 5.	" 103 " Pawtucket Horse R. R.,	-	-	-	-	515 00
" 12.	22 W. & St. P. Coupons,	-	-	-	-	750 75
Feb. 6.	9 Phil. & Erie,	-	-	-	-	315 00
Mar. 8.	Div. on 300 shares Adams Ex.,	-	-	-	-	600 00
May 6.	Division of moneys from W. & St. P. lands,	-	-	-	-	150 36
May 6.	Semi-annual payment on contract with Chic. & N. W. R. Co.,	-	-	-	-	1,691 90
May 19.	Div. on Oil Creek stock,	-	-	-	-	2,312 50
June 17.	Div. on 300 shares Adams Ex. stock,	-	-	-	-	600 00
July 27.	Int. on W. & St. P. lands,	-	-	-	-	280 08
July 27.	22 coupons W. & St. P. 1st mge., less tax,	-	-	-	-	750 75
July 27.	14 coupons W. & St. P. 2d mge., less tax,	-	-	-	-	477 75
July 27.	3 coupons La Crosse, T. & P., less tax,	-	-	-	-	146 25
July 27.	5 coupons Des Moines,	-	-	-	-	197 50
July 29.	9 coupons Phil. & Erie, free of tax,	-	-	-	-	315 00
July 29.	10 coupons O., C. & A. R. R., less tax,	-	-	-	-	326 70
July 29.	200 shares U. S. Ex. stock at 54,	-	-	-	\$10,800 00	
July 29.	100 shares U. S. Ex. Stock at 53½,	-	-	-	5,375 00	
					\$16,175 00	
	Less comm. \$37.50, stamps \$1.62,	-	-	-	39 12	
						16,135 88
July 31.	300 shares Adams Ex. stock at 81½,	-	-	-	24,487 50	
	Less comm. \$37.50, stamps \$2.46,	-	-	-	39 96	
						24,447 54
Aug. 1.	9 Phil. & Erie bonds at 88, less comm.,	-	-	-	-	7,900 00
Aug. 11.	Div. of moneys W. & St. P. land sales,	-	-	-	-	318 48
Sep. 7.	370½ shares O., C. & A. stock at 48½, B. 30,	-	-	-	17,852 50	
	Int. 30 days,	-	-	-	89 26	
					\$17,941 76	
	Less comm. and tax,	-	-	-	47 60	
						17,894 16
Sep. 7.	10,000 O., C. & A. bonds at 85½,	-	-	-	8,550 00	
	Less comm. \$25, and stamps. 86,	-	-	-	25 86	
						8,524 14
Sep. 9.	5 Des Moines bonds,	-	-	-	-	5,000 00
	Wood mortgage,	-	-	-	-	1,500 00
	C. & N. W. debt,	-	-	-	-	6,772 04
	Amount carried forward,	-	-	-	-	\$118,357 48

	Amount brought forward,		\$118,357 48
Sep. 9.	Int. on W. & St. P. lands, estimated,	-	10,000 00
	22 W. & St. P. bonds, 1st mge., estimated at 100,	-	22,000 00
	14 W. & St. P. lands, 2d. mge., at 94,	-	13,160 00
	3 La Crosse, T. & P. bonds, estimated at 100,	-	3,000 00
	7 West Side Elevated, 20,	-	700 00
	19 shares W., F. & Co., 6, at 21,	-	270 00
	250 shares U. S. Ex. Co., 51,	-	12,750 00
	103 shares Pawtucket Horse R. Co., 75,	-	7,725 00
			<hr/>
			\$187,962 48

## BEQUESTS.

Home Missionary Society,	-	-	2,500 00
Foreign Missionary Society,	-	-	2,500 00
Thetford Mil. Academy,	-	-	5,000 00
Jeanette Latham awarded	-	-	2,500 00
A. W. C. Latham, Thetford W. R. Junction,	-	-	2,500 00
19 shares W. F. & Co., taken from Miss J. Latham at			
67, \$1,273; less amt. rec'd for same, \$316,	-	-	957 00
Monument and legal expenses,	-	-	4,000 00
			<hr/>
			19,957 00
			<hr/>
			\$168,005 48

NOTE. Besides the property herein specified, there is certain real estate in California, to-wit, a 50 Vara lot, corner of California and Octavia streets, and a two-thirds interest in 20.06 acres in Alameda county. Said property Charles F. Latham desired should be given to his brother J. K. S. Latham, and a deed of which will be forwarded for the heirs to sign.

There were also debts to quite a large amount against Dr. William Latham, Gardner B. Murphy, and Payson Latham, which Mr. Charles Latham wished to have canceled and not included in any division of his estate with the legal heirs.

The remaining statement was an exact duplicate of the above, except as to the item referring to the lands, which item was as follows: "Interest in W. & St. P. land sales, say \$10,000." This latter is the one sent to and returned by complainant E. P. Latham.

The complainants, alleging that the foregoing proceedings, and the execution by them under the circumstances of the release above named, did not divest them of their interest in the lands aforesaid, bring this suit for an accounting as to proceeds of sales heretofore made, and for a conveyance to them of the undivided interest in the lands still unsold. The further facts, in so far as it is deemed necessary to state them, will be found in the opinion.

*Gordon E. Cole*, for complainants.

*Thomas Wilson*, for defendants.

MCCRARY, C. J. We are clearly of the opinion that upon the facts above stated, without more, it cannot be held that the complainants have divested themselves of the interest in the lands in controversy, which they acquired by inheritance from their brother, Charles F. Latham. It does not appear that either of the complainants were consulted about the sale of their interest to the defendant Barney and his associates, much less that they ever authorized the sale by such writing as the law requires, and the question, therefore, is whether the instrument signed by them and set forth in the foregoing statement can be held to be a valid release or conveyance, or effectual to estop complainants on the ground that it is a ratification or affirmation of the sale previously made by the said Barney. There can be no pretense that there was anything in the paper left with the complainant E. P. Latham that can be construed into an assent to or confirmation of such sale, for in that instrument there is no reference to any sale of the interest of the heirs in the lands, but only a charge for the interest of the heirs in the "Winona & St. Peter land sales." There is, of course, a wide difference between the interest of the heirs in the land sales and their interest in the lands themselves. Let us assume, however, that both complainants are bound by all the statements signed by them, and thus view the question from the stand-point of the defendants. It is more than doubtful whether the release and schedule signed by complainants, considered merely with reference to its terms, can be construed as a release of their interest in the real estate in question. They were dealing with the administrator of their relative's estate, and they must be presumed to have known that an administrator could deal only with the personal estate. This is not the less true because the defendant Barney was acting as such administrator without legal authority. He was at least bound by the rules which would apply to a lawful administrator.

With this rule in mind let us look at the instrument signed by complainants and now relied upon as a release of their interest in the lands in controversy. The very first recitation in this instrument is that "Charles F. Latham, late of the county of West Chester and state of New York, died intestate, leaving a considerable estate, *consisting of personal property*, to be distributed among his next of kin." In the subsequent recitals the property to be distributed is referred to both as "said estate" and as "the estate of said Charles F. La-

tham," and the release proper from the heirs to defendant Barney is, as will be seen by reference to the instrument, simply a release of said Barney from responsibility for the assets and property in his possession or under his control, and which had been "surrendered and delivered to the next of kin of said Latham." Surely there is nothing in the recital of this instrument that can be construed into a ratification or approval of any previous sale by the defendant Barney of the interest of the heirs of Latham in any real estate, and there is very much which would lead even the most careful reader to conclude that it was a release only as to the assets or personal property which Barney had possessed, controlled, and distributed. We should be very reluctant to hold that the insertion of one item in the schedule which accompanies the release, by which defendant Barney charges himself with "Int. in W. & St. P. lands, estimated at \$10,000," was of itself sufficient to constitute the transaction a release by the heirs of all their interests in the lands, even if the release had been executed to a stranger with whom they were dealing at arms-length, and upon terms of equality. In this connection it is worthy of remark that another item in the same schedule is couched in the very same terms, and yet confessedly refers to the proceeds of land sales, and not to a sale of land. We refer to item of date July 27th, which reads: "Int. in W. & St. P. lands, \$280." If, however, we assume that there was enough on the face of the instrument to advise complainants that they were receiving and giving a receipt and release for the proceeds of the sale by defendant Barney of all their interest in the lands in question, we are still of the opinion that it did not bind complainants so far as the sale of the land is concerned, nor estop them from claiming their interest therein, for the reason that even the most formal conveyance executed by heirs of Charles F. Latham to defendant Barney, while the latter had possession of the estate and was acting as administrator, would, under the circumstances, have been absolutely void.

The case of *Michoud v. Girod*, decided by the supreme court of the United States in 1846, (4 How. 503,) is very instructive, and satisfactory authority upon this question. It is there held that a purchase by executors of property of the estate, even though made at open sale, and where they were empowered by the will to sell the estate for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were, carried fraud upon the face of it, and was void. The rule is laid down without qualification that a person cannot legally purchase on his own account, or as an agent for others, that

which his duty or trust requires him to sell on account of another. He is not allowed to unite the two opposite characters of buyer and seller, and the sale then under consideration was set aside, after a lapse of over 25 years, notwithstanding the admitted fact that "the sale was a public auction, *bona fide*, and for a fair price." "The inquiry," say the court, "is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust* and a resale ordered, on the ground that the temptation to abuse, and the danger of imposition, are inaccessible to the eye of the court." The court proceeds to discuss the question whether such sales are void, or only voidable, and while admitting that cases may be found asserting that they are voidable only, the court declares with emphasis that there should be no relaxation of the doctrine that an executor cannot become the purchaser of the property which he represents, or any portion of it, even for a fair price, without fraud, and at a public sale; much less, of course, can he purchase from the heirs at private sale, and without disclosing to them any facts concerning the character or value of the property. Numerous other authorities to the same effect might be cited, but a single decision by the supreme court of the United States, directly in point, is sufficient.

It follows that the execution of the release above mentioned, from complainant to defendant Barney, considered in the light of a sale of their interest in the lands by Barney to himself and associates, or as an agreement approving and ratifying such a sale previously made by him, was wholly invalid. It cannot be doubted that if the defendant Barney was incapable of acquiring the interest of the complainants by direct purchase, he could not acquire it by transferring the property to himself and others without the knowledge or consent of complainants, and afterwards obtaining from them a release from all liability on account of the lands. If complainants sold their interest to Barney, it was by the execution of the release. They were parties to no previous sale, and, so far as appears from the evidence, knew nothing of any such sale, except as advised by the face of the instrument itself.

Further argument is not needed to show that the complainants are not estopped to claim their interest in the lands, unless it is by something that has transpired since the execution of the release; and this brings us to the consideration of the defenses which have been pressed upon our consideration by the learned counsel for the defendants. They are: (1) That complainants have been guilty of laches,

in that they did not, when advised of the fraud, at once rescind the contract, and tender back the consideration received; (2) that the complainants have ratified and confirmed the sale by accepting, after being fully advised, a balance of purchase money from defendant Barney.

As to the defense of laches and failure to rescind and return consideration, it may be said in the first place that the transaction complained of, being, as we have seen, absolutely void, there is nothing to rescind. The complainants have never parted with any interest in the land. The contract under which it is claimed that they have done so, being contrary to sound morality and public policy, is in fact and in law no contract, and it is, to say the least, doubtful whether it is capable of confirmation or ratification, even by affirmative action. The only effect of a failure to rescind is to ratify and make valid that which is otherwise voidable. Equity regards a purchase by a trustee or executor of the property or estate placed in his hands to manage for others as immoral, and contrary to public policy; and so the supreme court declares, in the case above cited, that the general rule which prohibits such purchases "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity." We should be very reluctant to hold that such a contract is ratified, confirmed, and made valid by the failure of the *cestui que trust* to rescind at once upon discovering the facts. It is not necessary to decide the question whether the heirs, in such a case as the present, can, after being fully advised, by an affirmative act confirm such a sale, for no such question is before us. The voluminous correspondence which is in evidence shows that complainants distinctly disaffirmed the sale as soon as they were fully advised, and that the parties entered into no negotiations respecting the repayment to defendant Barney of the sum distributed by him to the heirs as proceeds of the sale of the lands.

Again, we are of the opinion that the doctrine we are considering has no application to a purchase by a trustee from his *cestui que trust*, especially where there is an accounting to be had between them, and the trustee has in his hands funds belonging to the *cestui que trust*. In such a case the latter may, at any time within the statute of limitations, bring a suit to set aside the sale, by offering to submit to an accounting, and to pay any balance which may be found due the trustee. We have seen no case, nor do we think one can be found, in which the rule with respect to rescission and the return of the price has been applied to such a sale as the one now under consideration.

That rule applies only to contracts entered into between parties who deal at arms-length. This is well illustrated in the case we have already cited, (*Michoud v. Girod*), where the defense of laches was relied upon and overruled. In that case the executors of Girod had purchased the property of the estate at public sale in the year 1814, and in 1817 two of the complainants had executed formal releases to the executors for their share of the proceeds. It was not until about the year 1844 that suit was brought to set aside the sale to the executors, and yet there was no allegation of an offer to rescind the releases, and to return the money received prior to the bringing of the suit. It was held that the rights of the complainant were not affected by the releases, because they had been executed without "full knowledge of all the circumstances connected with the disposal and management of the estate;" but it was not suggested, either by the eminent counsel or by the court, that they were bound to rescind at once upon discovering the fraud.

Where a trustee, in violation of its trust, purchases the estate of his *cestui que trust*, the right of the latter to relief does not depend upon his having formally rescinded the sale. All that is required is that he shall apply for relief within a reasonable time, and this, as we have seen, may sometimes be a long term of years, and relief "will be granted upon the terms of the *cestui que trust's* repaying to the trustees the amount of the purchase money paid by him, together with interest, \* \* \* while the trustee, or the purchaser with notice, will have to account to the *cestui que trust* for the rents and profits of the estate." Hill, Trust. 539. In other words, there is to be an accounting, and, in all such cases, all that is necessary is that the party seeking the relief shall offer to submit to an accounting, and to pay over any balance in his hands. If this were not the rule, it might result that the *cestui que trust* would be required, as a condition precedent to his right to recover, to pay over to the trustee more than his due.

The present case well illustrates this rule. These complainants received two-ninths of \$10,000 from defendant Barney, which the latter insists was their share of the proceeds of the sale of their interest in the lands. The said Barney and his associates, having control of the complainant's interests in said lands, went on and made numerous sales. Before the complainants were fully advised of all the facts, and of their rights, a large sum had doubtless been realized by defendant Barney from such sales. Clearly, it cannot be maintained that complainants were bound to return the whole amount received. It does not appear how much was due. The duty of



Barney to pay over the proceeds of sales was just as imperative as that of complainants to return the consideration. All that either party could demand was a settlement,—an accounting,—and the payment of any balance due. In view of these considerations, without adverting to others, we are constrained to hold that complainants are not barred by laches, nor by their failure to formally rescind and tender back the consideration.

It is contended, in the next place, that complainants are estopped from denying the validity of the sale in question because they received a part of the consideration after a knowledge of the fraud, and thereby confirmed the transaction. The general rule, no doubt, is that the taking of any benefit under a contract, after knowledge of the alleged fraud, is a ratification of the contract. We will not stop to consider whether this doctrine applies to a contract that is absolutely void as against good morals and public policy, for, even conceding that it does, we are clearly of the opinion that it has no application to the facts of this case. It appears that the statement and schedule quoted in the foregoing statement were presented to complainants and the other heirs as a full and final settlement and distribution of all personal estate in the hands of defendant Barney. It appears upon its face to have been intended as a final distribution. There was, however, one item credited to said Barney designated "monument and legal expenses, \$4,000." This sum was left in the hands of the said Barney for the purposes named. Some time afterwards it was determined not to erect a monument, but to substitute a tombstone of comparatively small cost. This, of course, left a balance in Mr. Barney's hands and made a further distribution necessary. In the statements sent to complainants with a remittance of their respective shares of this balance, no mention is made of the land sales, or their proceeds. It seems to have been understood that it was a separate and distinct matter.

A long correspondence about the sale of the land and the disposition to be made of the \$10,000 distributed on that account, had preceded the disposition arising from the non-use of the monument fund, and was still pending. The matter of the alleged sale of the interest of the heirs in the land for \$10,000 had been long discussed by itself as a separate and distinct matter, and the evidence very clearly shows that complainants did not understand that they were adjusting that matter by accepting the last balance sent them. On the contrary, it appears beyond a doubt that they understood exactly

the contrary, for it is shown that when that balance was first sent to them it was accompanied by a formal release of defendant Barney from all claim on account of the proceeds of the sale of the lands, and a confirmation of said sale, which release and confirmation they both refused to sign. They refused to receive the money tendered them on condition that they would sign this document, and gave as a reason their unwillingness to confirm the alleged sale, and subsequently Mr. Barney sent them the money and accepted a simple receipt for it. Here is conclusive evidence that there was no intention to ratify the sale of the land by accepting this balance, and we apprehend that the rule of law relied upon by counsel for defendants rests upon the fact that the receipt of part of the consideration for a contract with full knowledge that it is fraudulent, shows a purpose to accept the benefit of the contract, and is therefore an affirmance of it. In the present case, the evidence does not show that complainants actually received a part of the \$10,000 after they were advised of all the facts. It only shows that they settled with Barney for the balance left in his hands for "monument fund and legal expenses," and not used for those purposes, and that the settlement was made when a separate negotiation was in progress with respect to the land matter, and it shows that complainants regarded the two as separate and distinct.

We hold, therefore, that complainants are not estopped to assert the invalidity of the sale in question upon the ground that they ratified and confirmed it by accepting a benefit from it after being advised of all the facts.

It was suggested in the argument that some of the defendants are *bona fide* purchasers of interests in the lands without notice of complainants' rights. This point is not well taken. The legal title is in the railroad company, and the equitable title only in the purchasers under the contract of sale. The protection extended by a court of equity to a *bona fide* purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title is not protected, even though without actual notice. *Butler v. Douglass*, 1 McCrary, 630; [S. C. 6 FED. REP. 228 ;] *Story*, Eq. Jur. § 1502; *Vattier v. Hinde*, 7 Pet. 252.

We are not advised that any of the defendants claim to have purchased from the railroad company without notice of the contract, or of the rights of the purchasers under it. If any such claim is made it can be considered hereafter.

Our conclusion is that the attempted purchase of the interests of the complainants in the lands in question by the defendant Barney for himself and his associates was and is void, and that the complainants are entitled to a decree so declaring, and to an accounting.

The case will be referred to a master to take further proof and report to the court as follows:

(1) The number of acres of land sold or disposed of out of the lands described in the bill since September 9, 1871, the dates of sales, the prices at which sold, and the sum total realized therefor.

(2) To this sum total the master will add interest on the several sums at 7 per cent. per annum from the date when received, and from the total thus obtained will deduct the sums received by complainants respectively from defendant Barney; also all necessary and reasonable expenditures by the defendant, or any of them, in making such sales, and for the payment of taxes, with like interest on each of said sums.

(3) And he will find and report what sum, if any, is due the complainants as their share of the proceeds of such sales.

(4) Said master will also find and report what number of acres of said land remains unsold, and a description thereof.

NELSON, D. J., concurs.

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## UNITED STATES v. SHINN.

(Circuit Court, D. Oregon. December 16, 1882.)

### 1. AFFIDAVIT USED UNDER TIMBER-CULTURE ACT.

By virtue of section 5 of the crimes act of March 3, 1857, (11 St. 250,) and section 6 of the timber-culture act of June 14, 1878, (20 St. 130,) an affidavit taken before a county clerk of this state may be used before the register and receiver in any proceeding or question arising under said last-named act in which an affidavit is allowed or authorized by any law of the United States or regulation of the land department thereof; and if such affidavit is willfully and knowingly or corruptly false in any material matter, an indictment for perjury may be maintained thereon in the proper United States court.

### 2. PERJURY.

Swearing to a false statement is not perjury unless the matter is material to the issue, question, or purpose about or for which the statement is made, or unless it is intended and calculated to give probability to a material statement or credibility to the affiant.

## 3. TIMBER-CULTURE ACT—COMPLIANCE WITH.

A person entering a quarter section of public land under the timber-culture act must break not less than five acres thereof within a year after his application therefor, and cultivate the same in some annual crop the next year, or it will be deemed abandoned; and planting the five acres in timber or cuttings is not such cultivation.

Indictment for Perjury.

*James F. Watson*, for the United States.

*G. W. Walker and Cyrus Dolph*, for the defendant.

DEADY, D. J. By the act of March 13, 1874, (18 St. 21,) "to encourage the growth of timber on the western prairies"—commonly called "the timber-culture act"—it is provided that any head of a family or person of the age of 21 years, etc., "who shall plant, protect, and keep in a healthy growing condition, for eight years, 40 acres of timber, the trees thereon not being more than 12 feet apart each way, on any quarter section of the public land," or in like proportion on any less legal subdivision thereof, shall be entitled to a patent therefor at the expiration of eight years, and on making proof of the facts. A party applying for the benefit of the act must make affidavit that the "entry is made for the cultivation of timber," and on filing the same with the register and receiver, and on payment of \$10, he shall be permitted to enter the quantity of land specified. A party entering a quarter section under the act must also "break 10 acres" thereof the first year, 10 the second, and 20 the third year after the date of such entry, and "plant 10 acres of timber the second year," 10 the third year, and 20 the fourth year after such entry; and in a like proportion for any less subdivision. If at any time after the application, and prior to the issuing of the patent for the land, the claimant shall abandon it, or fail to comply with any of the requirements of the act, the same "shall be subject to entry under the homestead laws, or by some other person under the provisions of this act;" the party making claim to said land, either "as a homestead settler or under this act," shall at the time of filing his application give such notice to the "original claimant" as may be prescribed by the land-office; "and the rights of the parties shall be determined as in other contested cases."

By the act of June 14, 1878, (20 St. 113,) this act was amended so as to require the party to plant and keep only one-fourth the number of acres in timber, and "to break or plow five acres" of a quarter section "the first year, five acres the second year, and to cultivate to crop or otherwise the five acres broken or plowed the first year;" the third year to cultivate in like manner "the five acres

broken the second year, and to plant in timber, seeds, or cuttings the five acres first broken or plowed, and to cultivate and put in crop or otherwise the remaining five acres, and the fourth year to plant in timber, seeds, or cuttings the remaining five acres;" and in like proportion for any less subdivision. Parties who had made entries under the act of 1874 are allowed by the act of 1878 to complete the same by complying with the provisions of the latter act.

On March 4, 1882, the defendant was accused by the grand jury of the crime of perjury in making an affidavit to institute a contest concerning a tract of land claimed under these acts. The defendant demurs to the indictment, for that the facts stated therein do not constitute a crime.

From the indictment it appears that on January 7, 1878, one Reuben Kinney entered, at the office of the La Grande land-district, upon application No. 77, the N. W.  $\frac{1}{4}$  of section 28, in township 5 N., of range 34 E., of the Wallamet meridian, situate in Umatilla county, Oregon, under the timber-culture act of March 13, 1874, *supra*; that on January 31, 1881, the defendant made an application to the register and receiver to enter said quarter section under the timber-culture act as having been abandoned by the original claimant, and for the purpose of procuring a contest between himself and Kinney concerning the right of the latter to the premises; at the same time filed an affidavit, subscribed and sworn to by himself on January 28, 1881, before the county clerk of said county, in which it was stated that Kinney had not complied with the act under which he had entered the land in these among other particulars:

"(1) That said Reuben Kinney did not, at any time within one year from the date of his said entry No. 77, break or plow five acres, or one-sixteenth, of the land covered by said claim, and did not in fact do *any* plowing upon said claim during the first year, after filing said claim; (2) that said Reuben Kinney did not, at any time during the second year, or at any time prior thereto, cultivate, by raising a crop or otherwise, five acres, or one-sixteenth, or any other portion of the land included in said claim No. 77."

Upon which perjury is assigned as follows:

"That the said affidavit is wilfully false, and not according to the truth, in this: (1) The said affidavit states that the said Kinney 'did not in fact do *any* plowing on said claim during the first year after filing said claim, (meaning application 77, aforesaid,) whereas, in truth and in fact, and the defendant well knew it so to be, the said Kinney did *some* plowing on said land during the spring of 1878.' (2) The said affidavit states that said Kinney 'did not, at any time during the second year, or at any time prior thereto, cultivate,

by raising a crop or otherwise, five acres, or one-sixteenth, or *any other portion* of the land included in said claim No. 77,' whereas, in truth and in fact, and, the defendant well knew the fact so to be, the said Kinney did, during said second year, cultivate the said tract of land, and did, in the month of January, 1879, plow 10 acres of said land, and, in December of said year, did harrow and cross-harrow said 10 acres, and mark the same in squares four feet apart each way, and did, during said December, plant seven acres of said ten acres to cuttings, placing one slip or cutting at the corner of each of said squares."

On the argument of the demurrer the following points were made: (1) That the county clerk was not authorized or empowered to administer the oath in question; (2) that the first assignment of perjury is upon an immaterial statement in the affidavit, and the second one does not show the falsity of the statement upon which it is made, and therefore no crime is charged in the indictment.

It was also assumed that the indictment was found under section 5392 of the Revised Statutes, which substantially provides that a person who takes an oath before a competent officer, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, and then "wilfully and contrary thereto states any material matter which he does not believe to be true," is guilty of perjury. Doubtless this section is comprehensive enough to include this case, if the clerk of the state court was authorized by any law of the United States or regulation of the land-office to administer the oath. *U. S. v. Bailey*, 9 Pet. 238. The fact of its being taken before a state officer authorized "to administer oaths generally," (Or. Code of Civil Proc. § 856,) and that it was actually used in a case in which the law of the United States authorizes an oath to be used, may of itself be sufficient to bring the case within the section. *U. S. v. Bailey, supra*. Nor does it expressly appear that a person attempting to claim an abandoned timber-culture entry is authorized or required to file with his application therefor a statement of the facts constituting such abandonment, or, if so, to make oath thereto. But it is understood to be the practice in the land department that when one person desires to enter land under the homestead or pre-emption acts already covered by the entry of another, which he deems invalid or abandoned, that the former makes and files with the register and receiver a verified statement of the facts constituting such invalidity or abandonment, upon which such officers, if they deem the matter sufficient, "institute," as it is called, a contest between the parties, in which evidence is taken *pro* and *con*, and a decision made for or against the entry.

In 4 Copp, Land-Owner, 21, there are two decisions by the secretary of the interior under the timber-culture act (March 19 and April 2, 1877) in which the statement by the contestant concerning the entry of the other is denominated an "affidavit of contest," and recognized as a lawful and authorized part of the proceedings.

The act (section 5) authorizes the commissioner of the general land-office to make rules and regulations for carrying it into effect, and provides that contests under it shall be determined as in other cases. But the act (section 6) expressly provides that section 5 of the crimes act of March 3, 1857, (11 St. 250,) "shall extend to all oaths, affirmations, and affidavits required or authorized" thereby. The effect of this provision is to make said section 5 a part of the timber-culture act, and to provide that an indictment for perjury committed in taking an oath authorized by it must be found and is triable under said section, rather than section 5392 of the Revised Statutes. This section provides—

"That in all cases where an oath, affirmation, or affidavit \* \* \* shall be made or taken before any person authorized by the laws of any state or territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are \* \* \* used or filed in any of the said local land-offices [of the United States] or in the general land-office, as well in cases arising under any or either of the orders, regulations, or instructions concerning any of the public lands of the United States, issued by the commissioner of the general land-office or other proper officer of the government of the United States, as under the laws of the United States, in anywise relating to or affecting any right, claim, or title, or any contest therefor, to any public lands of the United States, and any person or persons shall, taking such oath, affirmation, or affidavit, knowingly, willfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States."

The county clerk is an officer authorized to administer oaths by the laws of this state, and the oath in question was filed and used in a local land-office of the United States in relation to a claim to a portion of the public lands, and to affect a contest for the same. Assuming, then, as I do, that this affidavit, made and used as it was, is an act or proceeding authorized or recognized by the regulations of the land department as a means of instituting a formal inquiry into the validity or abandonment of a prior entry of a tract of the public land or a contest between adverse claimants to the same, this oath is within the purview of section 5 of the act of 1857, and perjury may be assigned on it with the same effect as if it had been taken before an

officer expressly authorized by a law of the United States to administer it.

The materiality of the matter upon which the first assignment is made, and the sufficiency of the second one, remain to be considered.

The matter must be alleged to be material, or it must appear to be so upon the facts stated. Where the facts are disputed, the question should be left to the jury, with proper instructions from the court. But when the facts are admitted the question of materiality is one for the court. 1 Whart. Crim. Law, § 1284; *State v. Bailey*, 34 Mo. 350.

In this case the "affidavit" is alleged to have been material upon the application of the defendant to have a contest instituted to try the question whether Kinney had not forfeited his right to the land entered by him under the timber-culture act, by a failure to comply with the same in the particulars therein mentioned. But it is not alleged that any particular statement in the affidavit upon which perjury is assigned was so material, but only the affidavit as a whole. The materiality of this statement must be determined, then, by its relevancy to the inquiry or issue suggested or made by the affidavit.

The timber-culture act requires the party making an entry of a quarter section under it to break and plow five acres thereof the first year. If he breaks any appreciably less quantity,—as only four and four-fifths acres,—it is not sufficient. He has failed to comply with the act, and the land is open to entry by another. During the second year he must break and plow another five acres, and cultivate to crop or otherwise the five acres broken the first year; and to "cultivate to crop or otherwise" is not "to plant in timber, seeds, or cuttings," but to sow or plant in wheat, corn, clover, potatoes, or other annual crop which may be cultivated and harvested or gathered during the year. The word "otherwise," so far as it has any significance, must be construed in connection with the preceding words, "to cultivate," so as to limit its application to some act or process which involves, primarily, the improvement or amelioration of the soil. And it is very plain that it does not include the planting or care of timber trees, which is placed by the act in contradistinction to the cultivation of the soil, the latter being intended, apparently, as a preparation for the former.

The question concerning which this affidavit was filed and used, so far as this assignment of perjury is concerned, is this: Had Kinney complied with the act, during the first year after making his entry, by breaking five acres of the land during that period? The affidavit states that Kinney did not plow five acres the first year, and adds



that, in fact, he did not plow any portion thereof during said period. The indictment alleges that the latter statement is false, because Kinney did do "some" plowing during the first year, and thereby impliedly admits that he did not plow five acres in that time.

Of course, the statement that Kinney plowed no portion of the land during the first year, taken unqualifiedly, was material to the inquiry, because it is at least equivalent to saying that he did not plow five acres. But it is negatived and falsified by the indictment in a narrower sense, as that he did not plow "some" portion of the land, which may be not more than a single furrow. But the inquiry or issue was not whether Kinney had plowed "some" of the land during the first year, but whether he had plowed as much as five acres of it. The plowing of any less quantity was altogether immaterial, and the statement, taken in the sense that he did not plow "some" portion of the premises, was irrelevant and superfluous.

A conviction cannot be had upon an assignment of perjury unless it be on a matter material to the issue. For instance, if the question is whether certain goods have been paid for or not, and a witness testifies that they have, and on a particular day, and in fact the goods were paid for, but on another day, this is not perjury, because the day was not material, but only the payment. But when the superfluous or collateral matter is calculated and intended to prop and bolster the testimony of the witness on some material point, as by clothing it with circumstances which add to its probability or strengthen the credibility of the witness, the case is otherwise. But when the alleged false oath only goes to a fact, the existence or non-existence of which cannot affect the question in dispute, then it is not perjury. The administration of the law is not impeded or affected by it. 1 Whart. Crim. Law, §§ 1276, 1277; *Plath v. Braunsdorf*, 40 Wis. 111; *State v. Bailey*, 34 Mo. 350; *Pollard v. People*, 69 Ill. 153; *State v. Aikens*, 32 Iowa, 403.

As the matter on which the first assignment is made, and the sense in which it is negatived, was not directly material to the inquiry in which the affidavit was used, nor in any way calculated to strengthen or make more probable the material statement therein that the full five acres had not been plowed, it must be held immaterial, and the indictment so far bad.

As to the second assignment, it is insufficient because it does not appear therefrom that any statement of the affidavit is false. The defendant swore that Kinney did not, during the second year, cultivate, by raising a crop or otherwise, five acres of the land, nor any

other portion of it. The last part of this statement is immaterial, as nothing less than the cultivation of the full five acres is a compliance with the act.

But the indictment does not show the falsity of any part of the statement. True, it alleges generally that the statement is false, but proceeds to state wherein and why, and in so doing impliedly admits its truth. The statement is false, says the indictment, because Kinney plowed and harrowed ten acres of the land during the second year, and near the close of it planted seven of such acres in "cuttings" four feet apart each way. But this is not the cultivation of the five acres to a crop, as required by the act, and therefore these facts do not negative or contradict the affidavit.

From this it only appears that Kinney broke ground and planted "cuttings" during the second year, and not that he cultivated five acres of the land as he was bound to do.

The demurrer is sustained.

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MORGAN and others v. BASS and others.

(Circuit Court, D. Indiana. August 9, 1882.)

1. LAND INCLUDED IN A CANAL—TITLE.

The owners of a canal have a right of landing and of using the bank of the canal in a manner consistent with the rights of navigation; but if the canal is to be filled up, and not used for the purposes of navigation, the title of purchasers of such canal and its appurtenances would not extend beyond what might be regarded as the highest water line.

2. SAME—TITLE OF ABUTTING LAND-OWNERS.

The title of owners of land abutting on a canal extends to the line of such canal, subject to the use of the bank of such canal by the canal owners for purposes of commerce and navigation.

At Law.

Mr. Ellison and Mr. Ninde, for plaintiffs.

Mr. Taylor and Mr. Bell, for defendants.

DRUMMOND, C. J. The jury found a verdict for the plaintiffs in this case, under the instructions of the court, and the defendants have made a motion for a new trial. It was an action of ejectment brought for a strip of land about 17 feet wide, more or less, lying on the canal basin, and claimed to be the northern part of lots 562 and 563 of Hanna's addition to Fort Wayne. Lots 562 and 563 were each 50 feet wide, and bounded on the east by Harrison street, on

the south by Pearl street, and on the north by the canal, or canal land. On the plat which Hanna made, and which was recorded, the depth of these lots north and south was marked as 163 feet, but the lines of the lots extended to the canal basin, and, as the court thought, and so instructed the jury, they were intended by Hanna to extend to the canal, and therefore the northern boundary of these lots was on the line of the canal, whether it was more or less than 163 feet north of Pearl street. The court did not instruct the jury that this north line was necessarily the water line of the basin, but laid down some rules to govern the jury as to the quantity of land that was covered by the canal, stating that it included the bottom, sides, and the tow-path, and any portion of the adjoining banks that were appropriated by the canal commissioners and used for the purposes of the canal, stating at the same time that as the canal was intended as a means of communication by water, it must be assumed that certain portions of its banks were to be used for the purposes of commerce, and for receiving and delivering freight along the line of the canal; and the court also stated that there was nothing in the evidence to indicate how far from the water line on the banks of the canal the right of the commissioners or owners of the canal extended, and that in those cases where no portion of the banks of the canal had been appropriated for the uses of the canal, it must be assumed that the owners of adjoining lots abutting on the canal would own their property to the canal, subject, of course, to the uses of the canal, as heretofore stated.

I can have no doubt that these instructions thus given by the court were substantially correct, and that they laid down the true rules upon the subject. The canal having ceased to be used for the purposes for which it was originally designed, it having been sold under the decree of this court under which divorce the plaintiffs claim, we had to determine the rights of the parties under the circumstances as they actually existed, and as shown by the evidence. It did not appear that along the north line of lots 562 and 563, and bordering on the canal, there had ever been any particular space appropriated by the canal commissioners, or by the state when it was the owner of the canal, for the uses of the canal. On the contrary, it appeared that the parties through whom the plaintiffs claim had to some extent—how far it was left to the jury to determine—exercised exclusive control and ownership over the land in controversy, and therefore there was no question growing out of any appropriation of the land by the canal commissioners, or the state, independent of what might be considered indispensable on the bank of the canal.

It is objected by the defendants that a deed which was made by the sheriff, conveying the north 25 feet of lots 562 and 563 of Hanna's addition, constitutes a breakage in the chain of title of the plaintiffs, and defeats the claim made by them of a possession of 20 years under their title.

The ground taken by the court in its instructions to the jury was that this deed conveyed the land in controversy, because the north 25 feet of these two lots would necessarily include all the land upon them up to the limits of the canal, and that proceeded upon the basis that Hanna's plat, as recorded, clearly showed that the lines running north and south did extend to the canal, and therefore the figures marked upon the lines as 163 feet were not conclusive as to the length of those lines. It would have been the same, precisely, as though there had been a conveyance made of the whole of the lots. The northern boundary would then have been on the line of the canal, whether land or water.

It is claimed there has been some evidence recently discovered which would have a bearing on the case, and which is adduced as an additional reason for the granting of a new trial, and that is a contract made between the state and one Charles Bellair, of the tenth of November, 1837, under which a portion of the Wabash & Erie canal was to be constructed. It is not claimed that this contract covered any portion of the ground or the lines in controversy in this case, but it is said that this was similar to other contracts that were made in relation to the construction of the canal. This is simply the statement of counsel, and there seems to be no independent proof of the fact. It is therefore not necessary to consider what would be the effect of such a contract if applied to the land which is the subject of controversy in this case.

The difficulty on the part of the defendants as the purchasers of the canal under the decree of this court consists in this: that there is no satisfactory evidence indicating how far their ownership would extend on the bank beyond the water line. The real contest in this case between the parties is, who shall own the dry land south of the water line, and up to the line running east and west, which is 163 feet north of Pearl street? The jury have found that there never has been any appropriation of this land by the proprietors of the canal. They have found for the plaintiffs generally, but it is not to be understood by this that, if the canal is to remain a water-course, and to be used for the purposes of commerce or navigation, that those who own it are to be deprived of all those rights which are applicable to such a

use of the canal. They would have the right, consequently, of landing, and of using the bank of the canal in a manner consistent with the rights of navigation; but it would also follow that if the canal is to be filled up and not used for the purposes of navigation, and the bed of the canal is to become dry land, then the rights of the defendants as purchasers of the canal, and its appurtenances, would not extend south of what might be regarded as the highest water line. In other words, because they were owners of the canal, and it had ceased to be such, they could not be permitted to extend their rights over the adjoining banks, and include the land of owners abutting upon the canal.

The motion for a new trial will, therefore, be overruled.

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STEPHENSON v. BROOKLYN CROSS-TOWN R. Co.\*

(Circuit Court, E. D. New York. July 25, 1881.)

1. PATENTS FOR INVENTIONS—IMPROVEMENT IN STREET-CARS—WANT OF NOVELTY—PATENT No. 142,810.

Where a patent was claimed for an invention for an improvement in street-cars, the device being one for opening and closing a door, and it was shown, as a defense to an action for an infringement, that some years prior to the time when it was said to have been invented another person made a machine intended for the purpose of opening and closing a door, similar in all its essential features to that upon which the patent was claimed, and used it during two weeks to open and close a door, and numerous persons saw the machine in operation, though the device was not applied to the door of a car, the defense of want of novelty must be *held* to have been made out, and patent No. 142,810 is void.

2. SAME—PATENT No. 161,568.

In a suit for alleged infringement of a patent for a device for signaling drivers on street-cars, consisting of two bell-cords with pull-straps passing along the lower margin of the roof on opposite sides of the car, and connecting directly with a bell or gong attached to the outside of the driver's end of the car, *held*, that there was no novelty in the use of cord or pull-straps, nor in the length of the pull-straps; nor was any new and different result attained by the change of the location of the cord, etc., from the top of the car to the lower margin of the roof, nor in duplicating the cord, etc.; nor was there a patentable combination of the cord and pull-straps with the car, or the sides of the car, effected by placing the cord, etc., along the side of the car. *Held*, also, that the addition of pendants to the cord, and drawing the cord taut, was not sufficient to support the patent, since attaching pendants to a cord is not a new idea, nor was it shown that a taut cord was a necessary feature. Patent No. 161,568 is void.

\*Reported by R. D. & Wyllys Benedict

3. SAME—PATENT No. 167,585.

A device consisting of a mirror so arranged in connection with the front hood of a car as to enable the driver to see into the car without turning round, is not an accomplishment of a new effect by a peculiar and novel method of using a mirror, and patent No. 167,585 is void.

*George Gifford*, for complainant.

*Francis Rawle*, for respondent.

BENEDICT, D. J. This action is founded upon three several patents for improvements in street-cars, issued to or owned by the plaintiff, John Stephenson. The nominal defendant is the Brooklyn Cross-Town Railroad Company, but the real defendant is stated to be the firm of J. G. Brill & Co., of Philadelphia, the builders of the cars which are alleged to infringe upon the patents sued on. These patents will be considered in the order in which they are set forth in the bill. The first patent set forth in the bill, No. 142,810, is for an invention made by John A. O'Haire. It was issued September 16, 1873, and afterwards assigned to the plaintiff. The invention secured by this patent is stated in the specification to consist in—

"A rod passing from the front to the rear of the car through a hollow bar, from which the hand-straps are suspended, and which has a crank or lever secured to each end. The front lever is in easy reach of the driver, while the rear one carries a roller which works up and down in a rectangular frame secured to the rear edge of the door, and through which the door is moved back and forth."

The claim is for the rod, the crank or lever, and guiding frame secured to the door, and combined with an operating lever for the driver, substantially as shown and described. In regard to this patent the question has been raised whether it is not by its terms limited to a device where the rock shaft is placed within a hollow bar. If the patent be so limited, it is conceded that no infringement of it has been proved.

Upon this question, although there is something to be said in favor of the construction contended for by the defendant, I incline to agree with the plaintiff that the location of the rock shaft within a hollow bar is not an essential feature of the invention described in the patent. I shall therefore, on this occasion, consider the patent as not requiring the rock shaft to turn within a hollow bar. So understood, the patent is for a device for opening and closing a door, consisting of a rock shaft, a lever attached to one end of the shaft, and also secured to the door by a guiding frame, so arranged that a person by means of a lever attached to the other end of the shaft, can open and close the door. To this patent, so understood, several defenses

are interposed, only one of which I find it necessary to pass upon. That defense is want of novelty. The testimony shows that in 1869, some years prior to the time when O'Haire is said to have invented his machine, one Samuel H. Little, upon the suggestion of his son-in-law, who was superintending a street railroad in St. Louis, made a machine intended for the purpose of opening and closing a car door, which machine is conceded to have been similar to that described in O'Haire's patent in all its essential features.

The existence of Little's machine is fully proved, and not seriously disputed by the plaintiff; but the plaintiff says all that Little did was to make a model for the purpose of experiment, and then abandoned his idea. In support of this position, reliance is placed upon the conceded facts that Little, although he had opportunity, never applied his device to a car; that two weeks after constructing his machine he removed the rock shaft and substituted an endless cord for the purpose of opening and closing the door, and thereafter sent the door with an endless cord, and without a rock shaft, to Washington, and there obtained a patent for his machine in that form. The defendant, on the other hand, relies upon the fact proved that Little did open and close a door by means of his machine; that he applied it to a door nearly six feet high, and used it during two weeks to open and close such a door, and thereby demonstrated the capacity of his device to open and close the doors of the ordinary street-car; that numerous persons saw the machine in operation, and that within three and a half years Little made a reproduction of his device, showing that he did not abandon the idea, although he never sought to secure an exclusive right thereto by means of a patent.

In regard to these facts I remark that the fact that Little never applied his device to the door of a car does not prove that his invention was never completed. What Little undertook to do was to invent a machine intended to open and close a door, and to show that his invention was capable of being used to open and close the door of a street car. He did invent a machine, the object of which was to open and close a door, and by applying it to the door to which it was applied he did demonstrate that it was capable of opening and closing the door of a street-car. The fact that he did not patent this machine, and shortly after did patent another device intended to accomplish the same purpose, while it goes to show that, in his opinion, the latter was the better machine, does not prove that the former invention was incomplete. Little had the right to abandon his first machine to the public, and he did so; but such abandon-

ment by no means compels the conclusion that his first invention was never completed.

Indeed, it seems impossible for the plaintiff to contend that Little's first machine did not display a completed invention, for the machine was in all respects similar to the machine described in the O'Haire patent, which the plaintiff is claiming in this suit, to have been a completed invention by O'Haire. And it is impossible to hold that Little allowed his invention to rest in experiment only, for the proof is clear that he applied it to a door, and that by such application he showed its capacity to open and close the door of a car. Moreover, there is no evidence to show that Little found any difficulty in the operation of the machine referred to, or ever contemplated any changes in it. On the contrary, the models he subsequently made reproduced the former machine without change, except as to size.

The controlling law in a case like this is to be found in *Coffin v. Ogden*, 18 Wall. 120, where it is held that the invention or discovery relied on as a defense must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The proofs here, in my opinion, come fully up to the requirements of the case cited; and, according to the ruling of the supreme court in that case, the defense of want of novelty must be held to have been here made out in respect to the O'Haire patent.

The second patent set forth in the bill is No. 161,568. This patent was issued March 30, 1875, to the plaintiff for an improvement in signaling drivers on street cars. The invention sought to be secured by this patent is stated in the specification to consist in "a new combination and arrangement with a street car of bells or gongs, and of the cords or straps which operate them." The object of the invention is stated in the specification to be to enable passengers in a street-car to signal the driver without leaving their seats. The claim is as follows:

"In a street-car two bell-cords, each provided with a system of pull-straps, and arranged in such a manner as to pass along the lower margin of the roof on the opposite side of the car, and connect directly with a signal bell or gong attached to the outside of the driver's end of the car, substantially as and for the purpose set forth."

The novel idea embodied in the invention described in this patent appears to consist in the employment of two bell-cords of a certain description, arranged in a peculiar way, for the purpose of ringing a bell in a street-car. The description of cord employed is a cord having pull-straps attached thereto of sufficient length to be within easy



reach of a seated passenger. The arrangement of these cords is the following: On each side of the car one such cord is placed, running along the lower margin of the roof, having one end attached to the inside of the car at one end, and the other end attached to a bell on the outside of the driver's end of the car. When so arranged the bell can be rung by any seated passenger by pulling any one of the pull-straps. In this invention the novelty cannot, of course, consist in the employment of a cord to ring a bell, nor in the use of a cord with pull-straps attached thereto. Those are old devices. Nor can the novelty be found in the length of the pull-straps, for no particular length is mentioned in the patent as necessary, and to bring a strap within reach by increasing its length is nothing new.

Neither was the plaintiff the first to combine such a cord and such pull-straps with a bell. Arrangements of that description have been long in use. But it is said that the novelty consists in this: that before Stephenson, a cord, pull-straps, and bell were placed in the top of a car, and that Stephenson changed the location from the top of the car to the lower margin of the roof, and thereby the cord, pull-straps, and bell were adapted to serve a substantially different and useful purpose. I am, however, unable to discover any different purpose accomplished by this change of the location of the cord, pull-straps, and bell of a car. The cord, pull-straps, and bell all act in precisely the same way when placed at the lower margin of the roof as when placed in the top of the roof, and the result produced is the same.

Again, it is said, Stephenson duplicated the cord, pull-straps, and bell. But the cord, pull-straps, and bell that Stephenson places on one side of his car, have no connection with the cord, pull-straps, and bell on the opposite side. It is a simple duplicate of an old device, without alteration of its mode of action or change in the result. Neither by duplicating the cord, pull-straps, and bell, nor by changing their location from the top of the roof to the lower margin of the roof, nor by both together,—and this is all that Stephenson did, according to his own witnesses,—was any new result attained. It is doubtless more convenient for some to use the cord, pull-straps, and bell, when located where Stephenson locates them, but no new result is accomplished by using the device in the new place. The apparatus is the same, and the result obtained by its use is the same as before. To authorize a patent the law requires the invention of a new thing. It is not satisfied by inventing a new place for an old thing without change of result.

I observe from the testimony that some of the experts entertain the opinion that by placing the cord, pull-straps, and bell along the side of a car a combination is effected with the car, or the sides of the car, which properly form the subject of a patent. And there are words in this patent that may have been intended to indicate that the invention consists in a combination, one element of which is a street-car. But I am obliged to confess myself unable to understand how the car, or the sides of the car, can be said to combine with the cord, pull-straps, and bell to produce the result sought, namely, the ringing of the bell. If so, then there is a patentable combination between the front-door bell and the house wherein it rings; between the church bell and the church. The cord, pull-straps, and bell are placed in a car in order that the bell when rung may be within hearing distance of the driver of the car; but there is no combination between the bell and the car in the legal sense, according to my understanding of the law.

The last position taken in support of this patent is that the invention consists in the addition of the pendants to the cord, and drawing the cord taut, instead of leaving it slack; and, it is said, drawing the cord taut and attaching to it a pendant, hanging within easy reach of a seated passenger, turned the old device that was a failure into a success. One difficulty with this position is that the patent says nothing about drawing the cord taut. Nowhere in the patent is mention made of a taut cord, and in the drawings attached to the patent the cord is not taut, but slack. Nor is it possible to gather from any part of the specification the idea that a taut cord is a necessary feature of the invention. Another difficulty is that attaching pendants to a cord for the purpose of enabling the cord to be pulled by those who may have occasion to pull it, is not a new idea first conceived by the plaintiff. If to attach a pull-strap to a cord be anything more than duplicating the cord, Stephenson was not the first to conceive such an idea, as the testimony in this case shows. For these reasons I am unable to sustain the patent under consideration as being for a new and useful invention made by the plaintiff, and must hold that it affords no ground for an action against the defendants.

The third patent set forth in the bill was issued to John Stephenson September 7, 1875, and is numbered 167,585. The invention described in this patent is therein stated to consist—

"In combining a mirror with the front hood of the car; it being so arranged in connection therewith, and with an opening in the front end of the car, as to give to the driver a clear view of the inside of the car, and through the

entrance door of the latter, and that without the necessity of his having to turn round for such purposes; thereby enabling him, without withdrawing his attention from the horses, to see when it is necessary to stop, either to receive a passenger, or to allow one to get out."

The claim is as follows:

"The combination of a bonnet, provided with a mirror, with an opening, or an opening covered by a transparent medium, in the front end of a street car, substantially as and for the purpose set forth."

In support of this patent it is contended that a new effect is produced by employing a mirror as the plaintiff does, because it enables a person who is outside a building or room to see through the room outside of which he is, and what is transpiring within the room and beyond the room in the rear of it; or, to quote from the expert called by the plaintiff,—

"By the combination described in the patent the driver can see the interior of a room consisting of a car, and, also, he can look through such room, and see the space in the rear, and he can do this while himself outside of the room into and through which he can see."

But this is not a statement of any new effect accomplished by a peculiar and novel method of using a mirror. It is simply a description of the common effect of a mirror; the only difference being in the object reflected by the mirror. A mirror is not applied to a new use when used to reflect a certain object for the first time. Is there any doubt that to the question how one could be enabled to see behind him the interior of a car, and also look through such car and see the space in the rear, being himself outside such car, that the answer of any intelligent person would be, "Employ a mirror?" Is there any doubt that every mechanic of ordinary skill, knowing the effect produced by a mirror, and knowing, also, that mirrors had been employed to reflect to the driver of a steam-car an image of the train behind him, and being required to devise a method to enable the driver of a street-car to do what the plaintiff claims his invention enables the driver to do, would at the moment, and without experiment, say, "Employ a mirror?" It does not seem to me possible that such a problem could be presented to the mind of a mechanic of ordinary intelligence without suggesting just such a use of a mirror as the plaintiff has described.

I am unable to see, therefore, how this patent can be sustained, upon the ground that a new effect is accomplished by the plaintiff's invention, or a new function performed by a mirror used as the plaintiff uses one. The most that can be said is that the occasion

was new; and, in view of the evidence, to say that is not entirely easy. The case seems clearly to be one of double use. It is also said that the plaintiff's invention discloses a new combination, first employed by him to accomplish the result described. According to the claim of the patent the invention consists in combining the bonnet of a car, provided with a mirror, with an opening in the front end of the car, in such a manner that objects within the car and in the rear of the car will be reflected in the mirror. But no combination between the elements described is effected by this arrangement. Between the bonnet and the mirror there is no co-operation. The only relation which the bonnet bears to the mirror is that of a support. No change in the operation or action of the mirror would result from substituting a different support in place of the bonnet. Any mirror located in the same place would without the hood reflect objects visible through an opening in the end of the car, in the same way that the plaintiff's mirror does. Nor is there any combination between the mirror and the opening in the end of the car through which the light passes to the mirror. The mirror does not co-operate with the opening; it simply, and of itself, reflects the objects before it in the same way as does any mirror located in any other place. Indeed, the mere statement of the claim that the combination sought to be secured is between a mirror and an opening, and that the result of the combination is a reflection on the mirror of the objects beyond the opening, to my mind sufficiently shows that the patent does not disclose a new and useful combination invented by the plaintiff.

These views compel the conclusion that the patent in question is void, and renders it unnecessary to consider the other grounds of defense to this patent, serious as some of them appear to be.

My determination upon the whole case, therefore, is that the patents set forth in the bill afford no ground of action against the defendant.

The bill is accordingly dismissed, and with costs.

NEWTON v. FURST & BRADLEY MANUF'G Co. and others.\*

(Circuit Court, N. D. Illinois. November 29, 1882.)

1. PATENTS FOR INVENTIONS—REISSUE—EXPANSION OF CLAIM.

Where the claim of the original patent did not cover the device used by the defendant, and a reissue was necessary to expand or explain the patent in order to cover defendant's plow, such reissue is void.

2. SAME—WHAT MUST BE SHOWN.

It is incumbent on the owner of a patent, when a reissue is taken long after the date of the original, to show that there was some mistake or inadvertence in the original issue, which made a reissue necessary to cover all the patentee had invented.

*Coburn & Thatcher*, for complainant.

*West & Bond*, for defendant.

BLDGGETT, D. J. This is a bill to enjoin an alleged infringement of a patent originally issued on the ninth of October, 1866, to F. S. Davenport, for an improvement in "gang plows," and reissued December 2, 1879, to the complainant, as assignee of Davenport. The original patent, as shown, covered nearly all the elements which enter into the organization of a "gang plow," and contained eight claims, covering the several specific devices which were combined to form the complete mechanism. One of the features of the original patent was a brake arranged to act upon one of the ground or carrying wheels, by means of which the forward ends of the plow-beams were raised, so that the plows, when in motion, would be lifted or thrown out of the ground by the power of the team; and this feature was specifically covered by the first claim. The reissue contains only three claims, all intended to cover the brake, or, as it is called in the reissue, "the clutch mechanism," by which the plows are lifted from the ground. The defenses set up by the defendant are—*First*, that they do not infringe the complainant's patent; *second*, that the reissued patent is void, for the reason that it is for a different invention than that described in the original, and has been unwarrantably expanded from the original.

It appears from the proof that after the issue of the original patent a few plows were made embodying the general features of the patent as a whole, but after a short experiment in offering this plow to the public, the owner of the patent, and those operating under it, introduced material changes in the general structure of the machine, and only retained so much of the original device as embraced the mode of lift-

\*Affirmed. See 7 Sup. Ct. Rep. 369.

ing the forward ends of the plow-beams from the ground by means of the brake applied to the periphery of the wheel. In 1874 the defendant company took a license from Mr. Newton, who was then the owner of the Davenport patent, and up to 1879 continued to make and sell "wheel plows" containing the Davenport brake attachment for lifting them out of the ground. As early as 1876 the defendant, in order to meet competition from other manufacturers, began the manufacture of the "wheeled iron" or "sulky plow," which is now charged to be an infringement of complainant's patent, but continued to make plows with the Davenport brake attachment until the fall of 1879, and to pay royalties to complainant therefor under the terms of its license. In the fall of 1879 the complainant insisted that the defendant's new iron plow infringed the Davenport patent, and demanded royalties thereon under the license, which the defendant refused to pay. The complainant then obtained this reissue of the Davenport patent, and this suit is brought to determine whether the new iron plow of the defendant infringes the Davenport patent as it now stands reissued.

The complainant's patent shows a plank or board 10 or 12 inches wide, to each end of which spindles are attached for the ground or carrying wheels to run on,—this is called in the specifications "the hinged board, G,"—and to it the forward ends of the plow-beams are attached by joints, so that when this board-axle or hinged board lies flat or horizontal, the plows are fastened to the rear or back edge of this board or broad axle; and when the axle is turned up on edge, or vertically, the ends of the plow-beams are lifted to a height equal to the width of the board or axle from its center. The brake mechanism is so arranged that when the brake is made to engage with one of the carrying wheels in motion, this axle is turned up edgewise, and the plows thereby lifted out of the ground.

The first claim of the original patent was in these words: "I claim as new, and desire to secure by letters patent, (1) the lever, *p*, rod, *q*, and brake, *r*, arranged and operating as and for the purposes described."

The claims in the reissue are as follows:

"(1) In a wheel plow the combination with a swinging axle and ground or carrying wheel of a friction clutch mechanism, and means to engage and disengage the latter with the ground or carrying wheels, said parts being constructed and adapted to raise the plow by locking the swing axle to the carrying wheel by friction clutch engagement, and raise the plow-beam by the draft or power of the team, substantially as set forth. (2) In a wheel plow

the combination with a ground wheel and swing axle, and a plow-beam connected to the latter, of clutch mechanism connected to the axle, and adapted by engagement with the wheel to utilize the draft of the team in turning the swing axle in an upright position, and thereby raise the plow-beams, substantially as set forth. (3) In a wheel plow, the combination with a ground wheel and swing axle and a plow-beam, connected to the latter, of a friction clutch, connected to the axle, and adapted by contact with the wheel to turn the axle into an upright position, and thereby raise the plow-beam by aid of the draft of the team, substantially as set forth."

The defendant's machine is a wheel or sulky plow, with a bent or cranked iron axle, upon which the plow-beams are pivoted at about two-thirds of the distance from the forward end to the coulter; so that the plow is nearly balanced upon the axle or crank, and the arrangement of the mechanism is such that when the plow is running or operating in the ground, the crank part is in a horizontal position, and when it is desired to raise the plows out of the ground, the crank is turned upwards towards a vertical position, whereby the forward ends of the beams are raised until the point of the plow runs out of the ground. After the forward end of the beam has risen to a certain point it strikes a stop, so that when the crank has assumed a vertical position the plow is balanced across the crank part of the axle, thus sustaining the plow at the height above the ground of the crank when in a vertical position. This turning of the crank axle so as to lift the plow is accomplished by a friction band, or brake, which is made to engage with an inner extension of the hub of one of the carrying wheels, so that as the wheel moves forward it causes the crank axle to turn upwards from a horizontal to a vertical position.

Is this friction band, encircling the extension of the hub of the carrying wheel in the defendant's plow, an infringement of the Davenport patent? Both these devices utilize the power of the team which draws the plow to raise the plow out of the ground. The purpose of each is substantially the same. The Davenport device applies the brake to the periphery of the carrying wheel. The defendant applies a friction band to the hub of the wheel. It must be conceded that these devices, in their mode of operation and effect, are very much alike; and if the state of the art was such, when Davenport entered the field, as to entitle him to a broad claim for any device by which the plow is lifted from the ground by the power of the team through a brake or clutch mechanism, I should have little hesitation in holding that the defendant's machine infringes that of the complainant.

It therefore becomes necessary to examine, in the light of the evidence in this case, the state of the art at the time Davenport made his invention.

The proof shows that in April, 1858, G. F. Anderson, of New Hampshire, obtained a United States patent for a seed-drill, or corn-planter, which, in addition to the apparatus for dropping, carried plowshares for the purpose of covering the seed. This is a wheel machine, and shows an axle with cams or eccentrics, and a clutch mechanism, whereby the axle is to be connected with one of the carrying wheels, so that the axle will rotate with the wheel, and the eccentric thereby raise the plow and seed-tubes off the ground to the extent of one-fourth a revolution of the cams. This cammed axle, or axle with eccentrics affixed to it, operates for the purpose of raising the plows out of the ground precisely like a crank axle, and the plows are raised by the draft or power of the team. It is also noticeable that this Anderson clutch mechanism is arranged to engage with the end of the hub of one of the wheels, therein closely resembling the device of the defendant in most respects, except that it is not a "friction clutch."

The United States patent of H. H. Baker, issued in December, 1860, for a "wheel plow," shows a clutch mechanism made to engage with a pin in the rim of one of the carrying wheels, whereby the plows were raised and caused to run out of the ground. This machine shows no crank axle, but it shows a rock shaft, extending transversely across the frame, which, for the purposes of the function of raising the plows from the ground, takes the place of the cammed axle of Anderson, or the hinged board, G, of Davenport. After describing his device in his specifications, Baker makes a specific claim for "raising the plows 1 and 2 vertically at will, by the motion of the bearing wheel through the aid of mechanism substantially as set forth." Here we have an inventor who not only shows a clutch mechanism arranged to engage with the bearing wheel and thereby raise the plows from the ground by the motion of the wheel, but he claims that as his particular invention.

The United States patent of H. B. Huie, issued in August, 1863, for a "wheel plow," shows a crank axle in combination with a plow-beam for the purpose of raising the plow from the ground, but he uses no brake mechanism, and does not utilize the power of the team to lift the plows.

I also find that a clutch mechanism arranged to engage with one or both of the carrying wheels was a common device for raising the



teeth of a horse hay-rake from the ground long before the Davenport invention. And in the United States patent to G. H. Daily and Robert M. Treat, issued in November, 1862, a crank axle is shown with brakes arranged to engage with the periphery of the wheel for the purpose of raising the rake teeth. This friction clutch or brake operated directly in combination with a crank or swing axle, and is so similar to the Davenport device for raising his plows that you have only to substitute a plow in place of a rake tooth and you have almost an exact reproduction of Davenport's mechanism for raising the forward end of his plow-beams.

I might, if I deemed it necessary to do so, refer to other proof in the case, but think it is already apparent that, at the date of Mr. Davenport's patent, older inventors had shown devices in wheel plows for utilizing the motion of the carrying wheel to raise the plow from the ground, to such an extent, and so nearly embodying the same instrumentalities adopted by Davenport, as to limit his claims as an inventor to his specific devices. It is true that some of the machines to which I have referred were not organized as plows, but their uses are so analogous to that of plows, and with a knowledge of these machines which Davenport must be presumed to have had, it was so easy to adapt these old corn-planter and horse-rake devices to a plow mechanism, that I deem them pertinent upon the question of the state of the art.

After a careful study of the mechanisms of complainant and defendant, I find that the brake, *r*, of the Davenport patent, which was arranged to engage with the rim or periphery of the bearing wheel for the purpose of raising the plows, is not identical with the friction band of the defendant's plow, which is arranged to engage with the extended hub of one of the carrying wheels; for although the result of the operation of each is the same, I do not think defendant's friction band can be said to be the same "means for engaging or disengaging the axle and carrying wheel," so as to raise the plow or plows, as Davenport's brake, *r*.

It will be borne in mind that, in the original patent, this device for raising the plows is claimed simply as "lever, *p*, rod, *q*, and brake, *r*, arranged and operating," etc, while in the reissue the claims are broadly for combinations of a swing axle, plow-beam, carrying wheel, and friction clutch mechanism, adapted to raise the plow by locking the axle to the carrying wheel. This cannot be construed to include any and all swing axles, and any and all friction clutches, and any and all plow-beams and carrying wheels; but it must be such a swing axle,

friction clutch, carrying wheel, and plow-beam as are shown in the complainant's device. Referring then to the complainant's patent, we see that he does not describe a swing axle at all, but describes a hinged board, G, and although this may have many of the characteristics of a swing or crank axle, it was something more than that in the complainant's organization.

So the complainant's friction clutch can only operate to raise the plows when the team is moving forward, while the defendant's friction band is so arranged, in connection with the hub extension, that defendant's plow can be lifted from the ground when at rest. I am therefore of opinion that the defendant's friction band does not infringe the friction clutch shown in the complainant's mechanism, and that the complainant, upon the state of the art, had no right to claim broadly any friction clutch whereby the crank axle should be locked to the wheel, but is confined to the friction clutch shown in his specifications and drawings.

As to the question raised in regard to the validity of the reissue, I do not deem it necessary to say more than that, under the recent decision of the supreme court with regard to reissued patents, the owner of this patent had no right, 13 years after the issue of the original, to expand the claims of the original patent so as to make it cover the combination of the friction brake with the other parts of the machine which were, perhaps, needed to make it operative, but which Davenport, at the time he took his patent, did not deem was any part of his invention. Both the evidence of the state of the art at the time Davenport took his patent, and the history of the uses to which this patent has been applied, all show that Davenport had no broad right to claim the combination of clutch mechanism, and cranked or cammed axles, which are the same, for the purpose of raising the plow out of the ground by the power of the team, for Anderson had done this in his combined seeder and plow, and the analogous device of the horse rake would certainly suggest how this might be done, if not instruct as to the mode of doing it, and this expansion of the complainant's patent was evidently made after the defendant's iron plow had been brought out, and for the purpose of covering the device of raising the plow which is there shown.

Clearly, if the claim of the original patent did not cover the device used by the defendant, and if a reissue was necessary to expand or explain the patent in order to cover the defendant's plow, then such reissue is void in the light of the case of *Miller v. Bridgeport Brass Co.* 104 U. S. 350; and *Campbell v. James*, 104 U. S. 356. It certainly

seems to me incumbent on the owner of a patent, when a re-issue is taken so long after the date of the original, to show that there was some mistake or inadvertence in the original issue, which made a re-issue necessary to cover all the patentee had invented; but the most that can be said in support of this reissue is that, perhaps, if Davenport had asked for these combination claims when he took his original patent, they might have been allowed at that time, but this does not show that after waiting 13 years, and till others have used the combination, he can now be allowed by a reissue to take all the combination claims which might have been conceded to him at the issue of his original, and thereby prevent others from reaping the benefit of improvements they have made in his mechanism, and which he neglected to claim in apt time to prevent others from using what he had abandoned.

I therefore find—*First*, that defendants do not infringe the complainant's patent as charged; *second*, that the reissue is void by reason of the expansion of the claims beyond those of the original patent.

The bill is therefore dismissed for want of equity.

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### HUBBELL and others v. DE LAND.

(Circuit Court, E. D. Wisconsin. November 6, 1882.)

#### PATENTS FOR INVENTIONS—PLEADING—SPECIAL PLEA.

The validity of the reissued patents questioned, on the ground that it appears by comparison of the original and reissue that the latter patent was for one thing and the former for another; that the claim in the reissue was unlawfully expanded so as to embrace improvements covered by other patents issued after the issuance of the plaintiffs' original patent, and before the reissue, and that therefore the reissue is void: *Held*, matter of defense that may be presented by special plea.

In Equity. On motion to strike plea from files.

*Duell & Hey*, for complainants.

*Finches, Lynde & Miller*, for defendants.

DYER, D. J. On the thirteenth day of April, 1869, letters patent No. 88,830, for an improvement in the manufacture of cheese, were issued to J. W. Andrews and N. J. Ogden, of the state of New York. On the third day of November, 1874, reissue letters patent No. 6,117 were issued to the plaintiff Hubbell, as the assignee by mesne assign-

ments of Andrews and Ogden, and the bill in this case is filed to restrain the infringement of said reissue letters patent, and for an account. To this bill the defendant has interposed a plea which avers that the original patent, issued to Andrews and Ogden, was not for the same invention as that described in the reissue; that the original patent "was for a mechanical device, or a combination of certain materials used in the manufacture of cheese, while the reissue, upon which this suit is brought, does not claim to be for said combination, but is for moulding the cheese within the bandage cloth, in contradistinction to applying a bandage after the formation of the cheese, substantially as and for the purposes set forth."

The original and reissue patents, with their specifications and claims, are set out *in hæc verba* in the plea. It is also averred in the plea that on the twenty-first day of March, 1871, a patent numbered 112,977 was issued to William Sternberg, and that on the ninth day of January, 1872, a patent numbered 122,520 was issued to Milton B. Fraser; both of which patents were for an improvement in cheese hoops, and are also set out in full in the plea. The plea concludes with the averment that the original patent to Andrews and Ogden "was limited to the particular combination of mechanical devices shown, and composing the apparatus described in said specifications; that said reissue patent abandons the claim in the original patent, and claims the process of moulding the cheese within the bandage, thereby expanding the claim so as to cover all subsequent improvements, and monopolizes a process not covered by the original patent, and which was in general use; therefore this defendant doth plead, in bar to the said complainant's bill, that said reissue patent No. 6,117 was issued in violation of the statute, and is not for the same invention as the original patent, and if said process is disclosed in the employment of the devices described in the original patent and not claimed therein, the same process being described and made use of by other inventors in subsequent patents before said reissue, said reissue is void."

A motion is now made by counsel for the plaintiffs that the plea be stricken from the files as improperly interposed, or that it be ordered to stand as an answer to the bill. The ground of the motion is that a defense which impeaches the validity of a patent cannot be specially pleaded, but must be set up in the form of an answer. Authorities are cited in support of the motion which it seems necessary to specially notice. In *Birdsall v. Perego*, 5 Blatchf. 251, the patentee of a machine granted an exclusive right under his patent to make

and sell machines in a given territory, for a specified fee to be paid to him for each machine made and sold, and brought a suit against his grantee to recover fees due and unpaid for machines made and sold. The defendant pleaded specially—*First*, that the plaintiff had infringed such exclusive right; and, *secondly*, that the plaintiff was not the first and original inventor of what his patent claimed. The pleas were demurred to, and it was held that they were bad on demurrer. The ground taken in the decision was that the plea that the plaintiff had infringed the defendant's exclusive right was not a defense to an action for the recovery of a sum agreed to be paid as a license fee for machines which the plea admitted were made and sold by the defendant; and, further, that the defense set up in this plea was in effect recoupment, and that recoupment is a matter never pleaded in bar; citing *Nichols v. Dusenbury*, 2 N. Y. 283, 286. As to the plea that the plaintiff was not the first inventor of what his patent claimed, it was held that, as the plea alleged no fraud on the part of the plaintiff, and no express warranty, and did not allege that the defendant had been disturbed in the enjoyment of the exclusive right transferred to him by any paramount title, and did not aver even the existence of any such paramount title, nor a retransfer of his alleged right, it constituted no defense to an action to recover license fees due for machines admitted to have been actually sold by the defendant. The statement of the case shows that it has no application to the question presented in the case at bar, which is one of practice, involving the right of the defendant to file the plea in question.

In *Wilder v. Gayler*, 1 Blatchf. 597, it was held that where the defendant in a patent suit pleaded the general issue and special pleas, and also gave a notice of special matter under section 15 of the patent act of July 4, 1836, (5 St. at Large, 123,) and the matters set forth in the special pleas were those of which notice might have been given under said section 15, the special pleas should be stricken out. The pleas are not set forth in the report of the case, but the general ground of the decision seems to have been that a defendant in a patent suit could not plead specially as a defense matters which the act of 1836 required him to specify in a notice in connection with a plea of the general issue. But this ruling appears to have been in conflict with the rule laid down by the supreme court in *Evans v. Eaton*, 3 Wheat. 454, where it was held, as stated by BERTS, J., in *Day v. New Eng. Car-spring Co.* 3 Blatchf. 181, "that in actions at law for the infringement of patent rights a defendant is not limited in his defense to the plea of the general issue allowed by the statute, even if his defense

rests upon matters which the statute authorizes to be given in evidence under the general issue, but that he may, at his option, plead those particulars specially."

In *Evans v. Eaton, supra*, it was said by the court:

"It has been already observed that the notice is substituted for a special plea; it is further to be observed that it is a substitute to which the defendant is not obliged to resort. The notice is to be given only when it is intended to offer the special matter in evidence on the general issue. The defendant is not obliged to pursue this course. He may still plead specially, and then the plea is the only notice which the plaintiff can claim."

If, then, in actions at law the defendant could plead specially the matters which, under section 15 of the act of 1836, he might give in evidence under a plea of the general issue and notice, it would seem to follow that the same course of procedure can be taken in such actions under section 4920 of the present Revised Statutes.

In *Day v. New Eng. Car-spring Co. supra*, which was an action on the case for the infringement of a patent brought by the assignee of the patentee, the defendant, with the general issue, without any notice of special matter, pleaded special pleas, setting up a license under the patentee paramount to the right of the plaintiff; and it was held that the special pleas were well pleaded, and could not be stricken out on motion.

As will be observed, all the cases referred to were actions at law; but *Sharp v. Reissner*, 20 O. G. 1161, was an action in equity, and it was held in that case by Judge BLATCHFORD that a special plea to the bill averring that the defendants had not made, constructed, used, or vendd to others to be used, the invention described in the patent, and denying infringement of the patent in any manner whatever, was not allowable, and that the issue of infringement ought to be tried under an answer and not under a plea. This authority is much relied on in support of the present motion, but I am of the opinion that it is inapplicable. The special plea in that case was little more than a mere denial of infringement. It brought forward no new matter displacing the equity of the bill. Argument can hardly be needed to show that the question of the infringement of a patent is not the proper subject of a special plea. As Judge BLATCHFORD says in his opinion, the question of the infringement of a patent depends very much on the construction of its claims, and that depends very much on prior patents on the same subject, and if such prior patents are to be put in, they ought to be set up in an answer and be put in once for all. And in that case it appeared by affidavit of the defend-

ants that if their plea should be overruled, they would desire by answer to put in prior patents to limit the scope of the plaintiff's patent, so as to render infringement impossible; thus proposing to litigate the question of infringement first by plea, and, failing in that, then by answer. Undoubtedly this case was well decided, but it does not, in my opinion, rule the case at bar.

Here it is proposed, under a special plea, to litigate the single question of the validity of the reissue patent; its validity being questioned on the ground that it appears by comparison of the original and reissue that the latter patent was for one thing and the former for another; that the claim in the reissue was unlawfully expanded so as to embrace improvements covered by other patents issued after the issuance of the plaintiffs' original patent, and before the reissue, and therefore that the reissue is void. Why is not this a matter of defense that may be presented by special plea? It was argued that if the plea shall be overruled, the defendant will be at liberty, under rules 34 and 39 in equity, to again make the same defense by answer. I do not so construe those rules. The question at issue now will then have been adjudicated. Upon overruling the plea, the defendant, it is true, would be assigned to answer the bill; but it does not follow that the matters litigated under the plea could be renewed in a defense made by answer. If the plea shall be sustained, that will be the end of the suit; and "whatever shows that there is no right which can be made the subject of suit, or whatever is a complete and perpetual bar to the right sued for, may constitute the subject of a plea in bar; or, as it is expressed in a work on pleadings at law, whatever destroys the plaintiff's suit, and disables him from recovery, may be pleaded in bar." 2 Daniell, Ch. Pr. 754.

In *Bailey v. Leroy*, 2 Edw. Ch. 514, it was held that when a bill sets forth a contract in writing, alleged to be signed by the defendant or his authorized agent, a plea of the statute, averring that there is no writing subscribed by the party or his authorized agent, is inadmissible, because it is merely denying what is alleged in the bill, and brings forward no new fact in opposition, which is the proper office of a plea. If a denial merely be intended, it must be by way of answer. This was the state of the case in *Sharp v. Reissner*, *supra*. There the plea merely negated certain allegations of the bill. It brought forward no new fact in opposition; or, in the language of the court in *Black v. Black*, 15 Ga. 448, it presented no new matter displacing the equity of the bill.

In the case at bar, the plea brings forward new matter in opposition to the equity of the bill—~~matter~~ which, if true, destroys the plaintiffs' suit and disables them from recovery.

The motion to strike the plea from the files is denied, and the plaintiffs have leave to set down the plea for argument or to take issue on the plea, as they may elect, within 30 days.

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### THE INDIA.

(District Court, S. D. New York. November 4, 1882.)

#### 1. VESSEL—CHARTER-PARTY—LIEN FOR SUPPLIES OF COAL.

By the terms of a charter-party the charterer was to provide and pay for all the coal required. The master and crew were to be appointed and paid by the owners, but the master was to be "under the orders and directions" of the charterers "as regards employments, agency, and other arrangements." *Held*, that a lien attached to the vessel for coal supplied at a foreign port on the order of the consignees of the ship appointed by the charterer.

#### 2. SAME—CHARTERER AS SPECIAL OWNER.

Where the charterers of a vessel were by the charter constituted owners of the ship *pro hac vice*, the vessel in their possession and not in possession of the general owner, the master subject to their directions, the vessel is bound for coals furnished upon her credit in a foreign port upon the order of the agent of the special owner.

#### 3. FOREIGN SHIP—LIEN FOR SUPPLIES.

It is not essential to the creation of a lien upon a foreign ship for supplies that the supplies be ordered by the general owner or his agent. When the general owner of a ship intrusts her entire possession and control to another as her special owner, and when such necessities are so supplied upon the credit of the ship, the ship is bound, although no personal liability is incurred by the general owner.

In Admiralty.

*Beebe, Wilcox & Hobbs*, for libelants.

*Ullo & Davison*, for claimants.

BENEDICT, D. J. This is an action to enforce a lien upon the German steamship *India*, for the price of a quantity of coal delivered on board that vessel at Philadelphia in June last. The undisputed facts are as follows:

The steamer *India* is a foreign vessel owned in Hamburg. In June, 1882, being then in the port of New York, she was chartered by the firm of Huser, Watson & Co., of New York, for "all lawful service and employment between



United States and Brazil, one round voyage, with liberty to call at intermediate ports for cargo." By the terms of the charter Huser, Watson & Co. were to provide and pay for all the coals required. The master and crew were to be appointed and paid by the owners, but the master was to be "under the orders and directions of Huser, Watson & Co." "as regards employment, agency, and other arrangements," and Huser, Watson & Co. agreed to indemnify the owners for all consequences or liabilities that might arise from the captain signing bills of lading or complying with their orders. All derelicts, towage, and salvage were to be for the owners' and charterers' equal benefit. By virtue of this charter the possession and control of the steamer passed to Huser, Watson & Co., of New York, and, as the answer expressly states, the steamer was in the possession of Huser, Watson & Co. at the time of the purchase of the coals in question. At Philadelphia the consignees of the steamer were S. Morris Waln & Co. This, I understand S. Morris Waln to mean when he told the libellant that the steamer was coming to his firm. The coals in question were ordered for the use of the steamer on her then intended voyage by S. Morris Waln & Co. They were delivered on board the vessel by the libellants, and were there received by the master of the steamer. After their delivery a bill made out against the steamer and owners was presented by the libellants to S. Morris Waln & Co., but was not paid because of the libellant's refusal to make a deduction claimed by S. Morris Waln & Co., by reason of a detention of the steamer alleged to have been caused by the libellant's failure to deliver the coals in proper time.

On the return of the steamer to New York she was libeled in this action, and the question now to be determined is whether the libellants acquired a lien upon the steamer for the coals so delivered by them.

Upon the testimony there is no difficulty in finding that the coals were supplied upon the credit of the steamer, and not upon the personal credit of S. Morris Waln & Co. There is testimony from Jacob S. Waln tending to show that the credit of his firm was relied on, but this testimony is flatly contradicted by Berwind, the other party thereto, and moreover is not inconsistent with a reliance upon the vessel's credit. A material man may, and generally does, rely upon a personal credit as well as the credit of the vessel. The question here is whether the coals were furnished upon personal credit alone. The testimony forbids such a conclusion.

It is, however, claimed that the coals were not ordered by the master of the steamer, nor by the owner of the steamer, nor by any authorized agent of the owner, and therefore it is insisted that no lien attached to the vessel. But the master of the vessel assumed charge of the receipt of the coals, and he hastened the delivery and assumed to direct the same, while the order for the coal was given by the consignee of the steamer. The consignment of the steamer to S. Morris

Waln & Co., in the absence of notice to the contrary, conferred upon S. Morris Waln & Co. apparent authority to act for the owner of the steamer in such a matter as ordering necessary coals. I say in the absence of notice, because, while the testimony of Jacob S. Waln is to the effect that he informed the libelants that he was acting for a charterer, and not for the general owner of the steamer, this testimony is also contradicted by the witness Berwind, and Berwind is to some extent corroborated by the undisputed fact that a bill for the coal was, at the time, made out against the steamer and owners, and the same received by S. Morris Waln & Co. without objection made to its form. In this state of the evidence, therefore, it cannot be held that notice of the existence of the charter was given to the libelants, and they chargeable with knowledge that S. Morris Waln & Co. were not acting in behalf of the general owners of the steamer. The case in this aspect is the ordinary one of supplies for a foreign vessel ordered by the agents of the general owner and delivered to the master upon the credit of the vessel and her owners; and by the maritime law a lien is created upon the vessel for supplies so furnished.

But the liability of the vessel is also clear, if the testimony of Mr. Waln be considered as the true account of the transaction between his firm and the libelants respecting this coal, and the libelants held chargeable with knowledge of the terms of the charter, and that Morris Waln & Co. were acting as agents of Huser, Watson & Co., and not as agents of the general owner of the steamer. For Huser, Watson & Co., of New York, were, by the charter, constituted owners of the ship *pro hac vice*. The steamer was in their possession, and not in the possession of the general owner. So the answer states. The master was subject to their direction, and not to the direction of the general owner. In any aspect of the testimony, therefore, the libelants were dealing with a vessel foreign to the port of Philadelphia, and the vessel became bound for the coals furnished upon her credit in such foreign port upon the order of the agent of the special owner.

It is not essential to the creation of a lien for supplies furnished a foreign ship that the supplies be ordered by the general owner or his agent. When the general owner of a ship intrusts her entire possession and control to another as her special owner, he thereby assents to the creation of liens upon the ship for necessities supplied by order of the special owner, and when such necessities are so supplied upon the credit of the ship, the ship is bound, although no personal liability is incurred by the general owner.

My conclusion, therefore, is that the libelants acquired a lien upon this steamer for the value of the coals in the libel mentioned. This conclusion is not in conflict with the decisions in the cases cited in behalf of the claimant, (*The Norman*, 6 FED. REP. 406; *The Secret*, 3 FED. REP. 665; and *The Lulu*, 10 Wall. 203,) and is in harmony with the principles of the cases of *The Schooner Freeman*, 18 How. 182; *The City of New York*, 3 Blatchf. 187.

Let a decree be entered in favor of the libelants for the sum of \$1,398.40, with interest from June 19, 1882, and the costs of this action.

### THE GRATITUDE v. THE EUTAW.\*

### THE EUTAW v. THE GRATITUDE.\*

(District Court, E. D. Pennsylvania. November 10, 1882.)

#### 1. COLLISION—CROSSING COURSES—MANEUVER IN EXTREMIS—BURDEN OF PROOF.

Where a tug-boat, running a course parallel with a steam-boat, signals her intention to cross the course of the latter, and while attempting to do so stops and backs immediately before a collision takes place, she must take the hazard of such departure from the ordinary rule of navigation, and, to escape liability, must show clearly an allegation that the steam-boat disregarded her signals and imperiled her own safety by continuing her former course at a negligent rate of speed.

#### 2. PILOT, LICENSE OF—NEGLIGENCE.

It is immaterial that the steam-boat was in charge of a pilot whose license had expired without renewal, he being of undoubted competency and long experience.

#### 3. REPORT OF LOCAL STEAM-BOAT INSPECTORS—EFFECT OF.

No weight can be given, in a judicial proceeding, to the decision of the board of steam-boat inspectors, made after an investigation conducted for their own purposes.

**In Admiralty.** Cross-libels to recover damages for injuries caused by a collision.

The facts were as follows:

About 9:30 o'clock A. M., September 6, 1881, the steam-boat *Gratitude*, being nearly opposite Cramp's ship-yard, was passing up the Delaware river at her usual speed, and in a line a little to the westward, or Philadelphia side, of the middle of the river. The tug-boat *Eutaw*, being in advance of the *Gratitude*, was proceeding on a parallel course to the eastward of the middle of the river. The *Eutaw*, desiring to run into pier No. 19, Philadelphia, by cross-

\*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

ing the bows of the Gratitude, blew one whistle, which was answered by one blast from the Gratitude, and hereupon the Eutaw starboarded her helm. When within a few yards of each other the Eutaw stopped and backed her engines, and immediately thereafter the Gratitude struck the Eutaw amidships, at a sharp angle. Both vessels were injured, and both filed libels. The Gratitude claimed that the collision was caused by the hazardous maneuver of the Eutaw in attempting to cross her bows, and afterwards stopping and backing. The Eutaw claimed that it was caused by the failure of the Gratitude to go to the right, as her answer had indicated she would do, and by her attempting to cross the bows of the Eutaw by continuing on her first course at a high rate of speed. It appeared that the pilot in charge of the Gratitude had allowed his license to expire without renewal, and that he had been a pilot for 30 years, and was of undoubted competency

The government board of steam-boat inspectors at the port of Philadelphia investigated the facts and decided that the collision had been caused by negligence on the part of the Eutaw.

*Henry R. Edmunds*, for the Gratitude.

*J. W. Coulston*, for the Eutaw.

BUTLER, D. J. The two vessels were passing up stream, virtually on parallel courses, the Gratitude being to westward of the channel, and the Eutaw eastward, a short distance in advance, each at customary speed. As they thus ran, no danger of collision existed. The Eutaw, desiring to pass to the western side, signaled the Gratitude to run under her stern, turned westward, slackening her speed at the same time, and very soon after, if not immediately, reversing her engine. The Gratitude, in attempting to pass under her sterns, collided, and both vessels were injured. Each accuses the other of fault, and is here as libellant, claiming damages. The Gratitude charges the collision to the Eutaw's half-executed attempt to run across her bows, as described, alleging that the distance between the vessels was such as to forbid the attempt; but that after signaling her purpose, and entering upon it, she should have pressed on westward, in which event the collision might have been avoided, though the risk would have been great. The Eutaw, after stating the situation of the vessels as they passed up the stream, (much as her antagonist has,) her object in crossing, etc., replies to the charge of fault as follows:

"Upon receiving the answer of one whistle from the Gratitude, the wheel of the Eutaw was put to starboard, and the Eutaw began to move to port and towards the western shore. While the Eutaw was rounding to \* \* \* the Gratitude, instead of going to the right, as her answer to the one whistle of the Eutaw indicated she would, and as she ought to have done, and as there was plenty of time and space to do, kept on at a high, dangerous, and unlaw-

ful rate of speed, and, without changing her course, attempted to cross the bows of the Eutaw. Seeing that a collision was imminent if the Gratitude continued on her course, the Eutaw, in answer to a hail from the master of the Gratitude to back, was stopped and backed immediately. After the Eutaw had begun to back there was nothing to prevent the Gratitude from avoiding collision; but instead of so doing the course of the Gratitude was suddenly changed, an attempt made to go under the Eutaw's stern, and there being insufficient space and time for such a maneuver the collision occurred."

The inherent improbability of this latter statement is such as to forbid its acceptance, in the absence of conclusive proof. Signaling her agreement to accept the Eutaw's proposition, and run eastward under her stern, why should the Gratitude "keep straight on, at a high rate of speed," and attempt to cross her bows, thus imperiling herself as well as the Eutaw? And then seeing that a collision was imminent, and hailing the Eutaw to back, seeing that she was backing, and that there was nothing then to prevent passing in front, why should she abandon her purpose so to pass, turn eastward and run into the Eutaw, in the foolish attempt to pass under her stern as she backed? To believe this, it is necessary to believe that the officers in charge of the Gratitude maliciously intended to run the Eutaw down, or that they were bereft of reason. That the evidence does not sustain this answer need hardly be stated. On the contrary, it shows very plainly that the Gratitude did not "keep on at a high rate of speed without changing her course," did not attempt to "cross the Eutaw's bows," did not "hail her to back, \* \* \* and then, turning eastward, attempt to pass under her stern." Capt. Davis, a witness called by the Eutaw, says the Gratitude, after answering the signal, went eastward, though not as fast as he thought she should. With the tide against her stern it is probable she would obey her rudder tardily; but whether the witness' position was favorable to accurate observation in this respect may be doubted.

In my judgment the collision is attributable solely to the improper conduct of the Eutaw. When she resolved to change her course, and signaled the Gratitude, the position of the vessels was such as to render the execution of this maneuver dangerous and improper. The precise distance between them cannot be known. It is probable the Eutaw was nearly, if not quite, as far eastward of the Gratitude as she was in advance. While we do not know the exact distance, we do know that it could not be many lengths; and that while the maneuver might have been successfully executed, doubtless, had each vessel faithfully obeyed the signal, it was imprudent and improper.

The Eutaw's witness, Capt. Davis, in answer to the question, "After the Gratitude had replied to the Eutaw's whistle, was there time enough for her to have gone over to the eastward with the space between them?" says: "Well, if their wheel had been put hard over, the space was short; and, according to my views, if her wheel had been hard over, she might or ought to have gone clear. I would like to say something further about this. The Gratitude is very long and very swift, and, as I said before, it seems to me if the helm had been put hard over as soon as the signal was answered she could have cleared; but there is some doubt in my mind about it." This is predicated upon the supposition that the Eutaw had held her course westward. The witnesses from aboard the Gratitude express the same view, and further testify that their vessel was turned eastward immediately on receiving the Eutaw's signal,—the wheel being put hard a-port,—and that the engine was promptly reversed. Yet so near together were the vessels that before her headway was overcome, and before the Eutaw had more than got about and straightened on her course, they were in dangerous proximity. Had the Eutaw proceeded promptly westward, the collision, doubtless, would have been avoided, though serious danger must have been incurred. Her first fault was in attempting the hazardous experiment proposed, and her second, in taking alarm at the danger she had occasioned, when the maneuver was half executed, and backing, so as to render the successful execution of her order to the Gratitude impossible.

In porting her wheel, and reversing her engine, the Gratitude did all that was possible. Up to this time she had been running at full speed. I see nothing to censure, however, in this. The Eutaw had been doing the same, and such is the uniform custom of all similar vessels in traversing this part of the river. There was nothing in the respective situations of the Gratitude and Eutaw to require unusual care on the part of the former, or diminution of speed, until the signal indicating change of course was received. Nor does it appear that the execution of the Eutaw's order would have been facilitated by a lower degree of headway. Had she held to her purpose, as she should, after signaling the Gratitude, and entering upon it, the collision would, doubtless, have been avoided. Hesitating, with it half executed, and then backing, the collision would probably have occurred if the Gratitude's speed, at the time of signaling, had been less. It is not a sufficient answer to say that the Eutaw would not have hesitated and backed, under other circumstances, supposed. She should not have done so under those existing; and we

are not at liberty to guess at what she would have done if they had been different.

It is unimportant that the pilot in charge of the *Gratitude* had allowed his license to expire without renewal. His competency for the service is undoubted.

It is proper to say that no weight whatever has been attached to the action of the inspectors, whose report was put in evidence, and referred to on the argument. The rights of parties injured by collision cannot be affected by anything these gentlemen may do in the discharge of their official duties. They may be called as experts, to solve nautical problems, if competent for this service; in no other way can the court listen to what they may do or say respecting cases of collision.

A decree will be entered sustaining the *Gratitude's* libel, and dismissing the *Eutaw's*.

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### BAKER and others v. POWER and others.

(*District Court, D. Minnesota. November 29, 1882.*)

#### 1. COLLISION—VESSEL HAULED UP ON MARINE WAYS.

Where a vessel hauled out and up on marine ways to be docked, for the purpose of having her hull repaired, by reason of insufficiency of the props and stays, breaks loose from her fastenings and slides down into the water, and comes into collision with another vessel, inflicting such injuries that the latter was wrecked and sunk, the same principles of law govern as in the ordinary cases of collision between vessels navigating the river, and the owners of the colliding vessel are responsible for the injury inflicted.

#### 2. SAME—NEGLIGENCE OF CONTRACTORS NOT TO EXCUSE.

The fact that a contract was entered into between the master and part owner of the colliding vessel, and the persons who had charge of the dock-yard and ways, and who took the vessel to haul her up and perform their contract, will not relieve the owners of all responsibility for loss occasioned by the negligence of such contractors.

#### 3. CONTRIBUTORY NEGLIGENCE—OWNERS RESPONSIBLE FOR ACTS OF MASTER.

Where the vessel wrecked by the collision had laid up after her last trip near the marine ways, and her master in charge had consented that she should be removed from her position above to a point directly in front of the marine ways, for the purpose of having her hauled out and up on them, and actually assisted in the removal, and left a watchman in charge, and the former pilot, and both knew the situation of the vessel on the marine ways, *held*, that her owners are responsible for the acts of the master, and that such acts contributed to the disaster, and that no recovery can be had in damages for the destruction of the vessel.

In Admiralty.

*Williams & Davidson*, for libelants.

*O'Brien & Wilson*, for respondents.

NELSON, D. J. The plaintiffs, owners of the steamer Col. McCleod, bring suit in admiralty *in personam*, to recover damages to the amount of \$17,000 for a collision by the steamer Butte with their vessel. The gist of this action is the alleged negligence of the defendants. The collision occurred upon the Missouri river, near the city of Bismarek, in the territory of Dakota. The steamer Butte was partly hauled up on the marine ways for repair, being dismantled, and having on board as watchman the mate of the steamer during the previous season of navigation. The owners had entered into a written contract with the persons in charge of the marine ways for hauling the vessel out, the terms of which contract are not material. The steamer McCleod had been put in charge of the same persons who hauled out the Butte, for the purpose of hauling her out, and had been dropped down to the landing in front of the ways, and lay just at the foot of the same, dismantled. These ways are built and used for the purpose of repairing the hulls of vessels, and are located on the land, the timbers gradually inclining or sloping to the river bank, and run partly into the river or to the edge, so that vessels can be hauled out and up on them, broadside. Marine ways are necessary for the proper repairing of vessels, and must be located near the water's edge, so that vessels afloat can be readily hauled upon them, and these dock-yards are not necessarily a nuisance, although the act of hauling out a vessel broadside upon them requires the exercise of great care and caution.

On the seventeenth of November, 1879, when the steamer Butte was partly hauled up on the ways, as stated, and the steamer McCleod was in front, preparatory to being hauled out, the shores or props sustaining the Butte being insufficient to hold her in position, she slid down into the river and collided with the McCleod, inflicting such injury that the latter was wrecked and sunk. The collision, although not the usual one occurring between vessels while navigating the river, is governed by the same principles of law.

I am of opinion that the owners of the Butte steamer are responsible for the injury inflicted on the McCleod, if no blame can be attached to the latter vessel.

It is insisted that the contractors, and not the owners, are liable. The fact that a contract was made between the master and part owner of the Butte with the persons who had charge of the dock-yard and ways, and who took the vessel to haul her up and perform his



contract, will not relieve the owners of all responsibility for loss occasioned by the negligence of such contractors. The negligence of the contractors who hauled out the Butte is conceded, and at the time of the collision a watchman was on board of the vessel appointed and designated by the master. In fact, the master was present when the vessel was hauled out, and knew her position, and how she was propped and stayed.

These facts fix the liability of the owners, for the persons employed to haul out the vessel are not such independent contractors, although the contract is in writing, that they can shield themselves from the consequence of the contractors' negligence.

This rule was applied by Dr. Lushington to *The Ruby Queen*, where the facts and circumstances did not present a case as strong as the one at bar. The Ruby Queen had been placed in the hands of a contractor for sale, and while under his sole charge drifted and collided with another vessel. She was held liable for the injury inflicted through the negligence of the contractor's servants. Lush. Adm. 286. The rule in cases of towage is to be distinguished from this. In the former, when the tow collides with a vessel through negligence of the tug and inflicts injury, the owners of the tug, and not the tow, are held responsible as contractors. The reason is obvious, for the movements of the tug are not under the control of those in charge of the tow, and it is impossible for them to prevent the negligent act of the tug or take steps to intercept it.

In the case at bar the master and part owner of the steamer Butte, was present when she was hauled out, and knew her position, and the manner in which she was propped and stayed. The plaintiffs, therefore, are entitled to a decree unless the McCleod was also to blame and contributed to her injury.

It appears that the steamer McCleod had laid up after her last trip near the marine ways, and the master in charge had consented that the vessel should be removed from her position above to a point directly in front of them for the purpose of having her hauled out. There is some evidence tending to show that the owners desired a contract with the operators and managers of these docks similar to the one entered into with the master of the Butte, but as the master of the McCleod consented to the change of place it is not material whether such contract was actually made. The master was responsible for the position taken by the vessel, and his consent is sufficient to bind the owners. He was not only present when she was dropped down, but assented, and left Bagley, the watchman, in charge, and

also McClender, the former pilot, and both knew the situation of the steamer Butte. It is quite clear that a proper course was not taken by the McCleod. She ought not to have been placed in the position she occupied until the Butte was laid upon the ways, in place, and securely fastened. The master, or person in charge, for whose act her owners are responsible, was to blame in allowing her to be dropped down at the foot of the ways in front of the Butte. It was a negligent act and contributed to the injury.

A decree will be entered in favor of the defendants for costs.

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### THE AMANDA POWELL.

(Circuit Court, D. Maryland. December 2, 1882.)

#### COLLISION NOT PROVED—DISMISSAL OF LIBEL.

Upon a careful consideration of the evidence *pro* and *con* in this case, it was held that the alleged collision was not proved, and that the libel must be dismissed

In Admiralty. Appeal from district court.

John H. Thomas and G. L. Thomas, for libelants.

I. A. L. McClure and A. Stirling, Jr., for tug Amanda Powell.

R. H. Smith, for schooner Silver Spray.

BOND, C. J. This is a libel for a collision which took place in the harbor of Baltimore. The facts relating to it, so far as they can be definitely ascertained, appear to be these:

The barge I. I. Munder was lying at the west side of Jackson's wharf, and fastened to it by lines from her bow and stern. Directly opposite her, at another wharf, the bark Nokomis was lying, there being between the bark and the barge a water-way sufficiently wide to permit the schooner Silver Spray to pass, and to lay at the wharf above the bark. The barge was laden with corn. At 5 o'clock in the morning of the nineteenth of September the floating elevator Hattie had removed all the corn which was contained in the bow of the barge, which could be reached through the forward hatch, and left her with her bow elevated and her stern depressed, the weight of her cargo being astern. Between 9 and 10 o'clock of the same morning the steam-tug Amanda Powell undertook to place the Silver Spray at Jackson's wharf. On arriving at the wharf she was halted by the agent of the Northern Central Railroad Company, which apparently controls the wharf, and was told to wait until the agent could see whether the Silver Spray was entitled to a berth there. This having been immediately ascertained affirmatively, the tug, which was lashed to the side of the schooner, proceeded up the dock with her

some 15 feet, and until she had entered the water-way between the barge and the bark Nokomis. There she parted from her, there not being room for both of them to pass, and the schooner was hauled up to her place by lines from the wharf about her windlass. It took about half an hour to pull her past the barge, which itself had to be removed from its moorings lower down the dock to give the schooner berth-room at the head of the dock. Shortly after the barge was found to be sinking, and upon subsequent examination it was discovered she had a hole in her starboard side, which was that next the wharf, about eight inches long and three inches wide.

The libelants allege that the injury to the barge and cargo was owing to the collision of the schooner with her, while in charge of the tug, as she was endeavoring to pass between the bark and the barge. The respondents deny that there was any such collision, and affirm that the sinking of the barge after the schooner had passed was *post hoc* and not *propter hoc*.

The evidence, as in most cases of collision, is in direct conflict. Three witnesses for the libelants, who were on the bark, say they not only saw the collision but heard a crash at the time which could have been heard 60 feet; while the agent of the railroad states that he watched the whole process, and that there was no collision, and that he heard no noise whatever, though he was on the wharf and was separated from the schooner, as she passed, by the width of the barge. Yet another witness states that he was on the barge during the passage of the schooner watching the movement, and there was no collision and no rolling or motion on the part of the barge. Of course, the crew of the schooner and the tug deny that the schooner collided with the barge, which apparently had no crew,—at least none on board, the captain of it being a block or two away at a drinking-house. I have not recited all the testimony *pro* and *con* respecting the fact of collision or no collision. Suffice it to say that it is equally contradictory. Under this state of the evidence, to say the least, it is difficult to determine what the facts are, from the parol testimony. The libelants are required to make out their case by a preponderance of testimony before they can recover.

I have carefully thought over all of the testimony, and cannot bring my mind to the conclusion that there was any collision at the time at all. The witnesses who were on the bark say so, but their description of the process by which the tug undertook to put the schooner in the dock upon her arrival is clearly untrue. They make a mistake as to which side of the schooner the tug was on, and are wrong in their statement as to the manner she turned the schooner's bow around. The noise they describe is altogether too great for the

alleged occasion of it, and had the collision occurred in the way they state, and with the force they say it did, there would have been some trace of the blow upon the starboard side of the schooner and upon the port side of the barge. But there was no trace of any blow to be found, the damage to the barge being upon the side of it next to the wharf—her starboard side. Moreover, it seems to me that had the tug swung the schooner's bow around against the barge as these witnesses describe it, when her anchor was hanging from her cat-heads in the water, there would have been some mark or rupture made by it, either upon the barge or schooner, or upon both.

All the facts of the case seem to show that no reliance can be placed upon the testimony of these witnesses.

It appears to me, likewise, that had the collision occurred as the libelants' witnesses stated it did, the character of the injury to the barge would have been different. It would have been, not a hole eight inches long and three or four wide, but a crushing of her planking, extending over a considerable space. Nevertheless, shortly after the schooner was docked the barge began to sink. It is impossible to tell, and it is no part of our duty to ascertain, when it received its injury. The carelessness of her captain, who apparently leaves her to take care of herself, to be moved around by every one who finds her in the way, would allow such an injury to be given without knowledge of it at the time. It is quite likely that this hole in her had been made either by the elevator, or even before the elevator reached her, and when the corn was removed from her bow the depression of her stern submerged the orifice, and, making water slowly, she began to sink.

Whether this was so or not, I am of the opinion that the great preponderance of the evidence is that there was no damage done her by these respondents.

The libel will be dismissed.

## THE HUDSON, etc., and another.

*(District Court, S. D. New York. November 24. 1882.)*

## COLLISION—RULES OF NAVIGATION.

A steam-tug having another tug, with which there is danger of collision, on her own port hand, is bound by the twenty-third rule to keep her course; and it is no defense to a violation of this rule to show that she blew two whistles, and at once sheered to port in order to give the other tug more room to cross her bows, on the supposition that the other tug designed to cross the stream, the latter not having given any answering signals assenting to this maneuver; and where a collision ensued from such change of course, the former was held liable.

In Admiralty.

*E. D. McCarthy*, for libellant.

*Benedict, Taft & Benedict* and *S. H. Valentine*, for the Hudson.

*Scudder & Carter* and *G. A. Black*, for the Yosemite.

BROWN, D. J. The libel in this case was filed by the owner of the canal-barge Shoe, to recover damages for a collision on the fourth of February, 1880, with the schooner Yosemite, in Buttermilk channel, whereby the barge was sunk. The Yosemite was in tow of the steam-tug Hudson, upon a hawser about 200 feet long. As they were coming up about the middle of Buttermilk channel, with a strong flood-tide, the captain of the Hudson, when about abreast of the black buoy, saw the steam-tug E. A. Packer, with the Shoe in tow, lashed upon her starboard side, coming down the stream near Governor's island, and not far from the government docks. Shortly afterwards he gave two blasts of his whistle, and, without waiting for any reply, he immediately starboarded his helm, designing to go to the left, between the E. A. Packer and Governor's island. In doing so the Hudson went about 75 feet clear of the barge, but the Yosemite, unable to keep in the wake of the Hudson, and being swept further out by the strong tide, was drawn against the stem of the barge and sunk her. Those on board of the Yosemite did all that they could to keep away from the barge, and no fault being found in them, the libel, as to the Yosemite, must be dismissed, with costs.

The Hudson was plainly in fault, and must be held liable on several grounds. The E. A. Packer, with her tow, having a strong adverse tide out in the stream, was making her way just inside of the eddy, along the line of the shore, and at a distance of from 150 to 200 feet therefrom. When first seen from the Hudson she was above the elbow formed by the shore line below the government docks, and was therefore pointing somewhat across the channel and towards the

Brooklyn shore. The Hudson was on her starboard bow, while, according to the preponderance of testimony, the Hudson, before her change of course, had the E. A. Packer somewhat on her port bow. In this situation, under rules 19 and 23, it was the duty of the Hudson to keep her course, and the duty of the E. A. Packer to keep out of the way. There is no reason to suppose the Packer would not have done so if the Hudson had held her course, according to the twenty-third rule, as there was plenty of sea-room and no obstructions. The Hudson's strong sheer to port, under a starboard helm, in violation of the rules, led directly to the collision, and for this the Hudson must be held liable. The excuse given by her captain, that from the way the Packer was heading he supposed she was going across the stream to the coal-docks below Hamilton ferry, cannot be admitted as sufficient to exonerate the Hudson. Not only was this surmise as to the destination of the Packer incorrect, but the excuse, if allowed, would defeat one of the very objects of the rules of navigation, which is to establish certainty in navigation, instead of the uncertainty dependent upon surmises. It was the manifest duty of the Hudson to observe the rule and keep her course, at least until a different course was agreed upon by both vessels through the exchange of mutual signals. The captain of the Hudson did not do this; but, incorrectly assuming that the Packer was designing to cross the stream when she was merely keeping the line of the shore, and intending to continue down within the eddy, assumed also the responsibility and the risk of violating the rules by blowing two whistles and immediately making a strong sheer to port, without waiting for any signals of assent from the Packer, which, in fact, were never given.

All the circumstances of the case, moreover, rendered the maneuver of the Hudson a rash one, except upon the assured co-operation of both tugs after mutual assenting signals. The Packer was moving slowly, within a slight downward eddy near the shore; the Hudson was going at the rate of some six or seven miles per hour, in the full strength of the flood-tide; and when the Hudson whistled, the tugs were only about a quarter of a mile, or less than two minutes, apart. In taking a strong sheer to port, out of the tide and into the eddy, so as to pass between the Packer and Governor's island, it was manifest that the Yosemite, on a hawser 200 feet long, could not be kept so far in shore as the Hudson, but would necessarily be swept along somewhat outward by the strong flood-tide, thus rendering any nice calculations as to her exact course impossible, and the maneuver a very hazardous one within the narrow space allowed available.

The prevailing reason for the Hudson's course seems, however, to have been the captain's preference for the westerly fork of the channel around Diamond reef, instead of the easterly one. But it was proved on the trial that the easterly one was equally safe, and was then unobstructed: so that no weight can be given to that consideration.

The Packer not being sued, I have not considered whether or not she was in fault for not doing all she could to avoid the collision.

The libellant is entitled to judgment against the Hudson, with costs, and to an order of reference to ascertain the damages.

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THE ISMAELE.\*

ALLEGRO v. LEBER.\*

(District Court, E. D. New York. December 16, 1882.)

1. BILL OF LADING—CARGO NOT DELIVERED—BURDEN OF PROOF.

A cargo of sulphur, on being weighed as delivered, proved to be 28 tons short of the amount stated in the bill of lading, which also contained a memorandum "weight and quality unknown;" three officers of the vessel testified that all the sulphur taken in was delivered, except what escaped through the pumps. *Held*, that the burden was upon the consignee to prove that the difference arose from abstraction of the missing quantity on the voyage.

2. MASTER'S GRATUITY.

On the above state of facts, the master was *held* entitled to recover a gratuity provided by contract to be paid to him by the consignee on proper delivery of the cargo.

In Admiralty.

*Ullo & Davison*, for the vessel and the master.

*Sidney Chubb*, for the consignee.

BENEDICT, D. J. These two cases were tried together. One action is for non-delivery of 28 tons of sulphur, alleged to have been shipped on board the Italian bark *Ismaele* in the port of Girgenti, to be thence transported to New York. The second-named action is to recover a gratuity of £10, provided by contract to be paid to the master on proper delivery of the cargo of the same vessel on the same voyage, being the same cargo of sulphur referred to in the action for non-delivery. On the part of the merchant, Leber, the charge is that 28 tons of sulphur were abstracted from the cargo during the voyage in

\*Reported by R. D. & Wyllys Benedict.

question. On the part of the bark, the averment is that all the sulphur shipped was delivered, except a small portion that came out through the pumps when the ship was pumped at sea during the voyage in question.

The bill of lading signed by the master describes the cargo as consisting of 558 11-20 tons of sulphur, but it contains a memorandum "weight and quality unknown," and does not, therefore, afford evidence of the quantity shipped. The sulphur was laden in bulk, and constituted the whole cargo of the vessel. The voyage was from Girgenti to New York direct, and there is no evidence that the vessel stopped at any intermediate place during the voyage, or that any of the cargo was lost during the voyage, except the small portion that escaped through the pumps. On arrival in New York the sulphur was weighed as delivered, and found to weigh 530 tons, being 28 tons less weight than stated in the bill of lading. The ship-master, his mate and his boatswain, testify that all the sulphur taken in at Girgenti was delivered in New York, except what escaped through the pumps. The testimony of these persons is sufficient to cast upon the merchant the burden of proving that the difference between the weight stated in the bill of lading, and the weight ascertained at the delivery, arises from an abstraction of the missing quantity from the cargo during the voyage. Accordingly, the merchant has attempted to prove the weight of sulphur shipped. But the testimony taken under a commission to Girgenti for this purpose is fatally defective. This testimony, while it shows that the sulphur shipped went from the warehouse to government scales to be weighed, and thence to the seashore, and then to the bark, contains no legal proof of the actual weight of the sulphur so shipped. The persons who did the weighing, and whose names are disclosed, were not examined. This omission, under the circumstances, is one that cannot be overlooked, and it leaves the testimony respecting the weight of the sulphur shipped incomplete, and insufficient to overthrow the testimony in behalf of the bark that all the sulphur shipped was delivered in New York.

The merchant has also sought to prove an abstraction of cargo by evidence respecting the condition of the cargo under the three hatches of the vessel at the time when the hatches were opened in New York, and from this evidence draws the conclusion that sulphur was shoveled out of each of the three hatches during the voyage. But I am unable to draw such a conclusion from the testimony that has been presented. The officers of the vessel explain the appearance of



the cargo under the hatches by saying that they were compelled to retrim the cargo at sea after heavy weather, and in so doing left the sulphur under the hatches in the condition it was in on arrival; and their testimony is sufficient to overcome the not very probable suggestion that the three hatches of the bark were opened during the voyage, and sulphur shoveled out of each hatch to the amount, in all, of 28 tons, and the same placed on board some other vessel supposed to have come along-side the bark for that purpose. Certainly it would be improper to infer that such a transaction had taken place from the mere appearance of the cargo at the time the hatches were opened in New York, in the face of positive testimony that no such thing was done. But little support to the merchant's case is obtained from the testimony that, when the hatches were opened, the mate falsely stated that sulphur had been thrown overboard during the voyage. The mate could speak very little English, and those who conversed with him could not understand Italian, and I am not certain that he was understood. It is quite likely that he was alluding to sulphur that had been cast out by the pumps.

My conclusion, therefore, is that the non-delivery of sulphur charged by the merchant has not been proved. The result is that the libel of the merchant must be dismissed, with costs, and the libel for the gratuity must be sustained.

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### THE CALISTA HAWES.\*

(District Court, E. D. New York. December 4, 1882.)

#### NEGLECT IN HOISTING BARREL—PERSONAL INJURY—LIABILITY.

Where an assistant United States weigher, whose duty it was to keep tally of a vessel's cargo while it was being discharged, was required to be about the main hatch on the main deck of the vessel, and the mate undertook to hoist a barrel from the pier on the opposite side of the vessel from that on which the cargo was being discharged, with the tackle and fall employed to raise the cargo from the hold, which was so arranged that the barrel was swung across the deck in spite of the efforts of two men stationed on the rail to assist in getting the barrel to the deck, and the barrel, while so swinging, struck the weigher, who was standing on the deck with his back turned to the rail, and knocked him over the combings of the hatch into the lower hold, no warning having been given him in time to enable him to move, *held*, that the libellant's injuries arose from a neglect on the part of the owner of the ship to discharge

\*Reported by R. D. & Wyllis Benedict.

a duty arising on navigable water out of the employment of the ship as an instrument of commerce, and owing to the libellant, and that the vessel was liable for the injuries resulting, and there must be a reference to ascertain the amount.

In Admiralty.

*Beebe, Wilcox & Hobbs*, for libellant.

*Butler, Stillman & Hubbard*, for the vessel.

BENEDICT, D. J. The facts of this case are not in doubt:

The libellant, William G. Vance, was an assistant United States weigher, whose duty it was to keep tally of the cargo of the ship *Calista Hawes*, while that vessel was discharging her cargo in this port. The cargo consisted of iron ore, and was discharged into a lighter lying along-side the ship on her starboard side. The libellant, in order to a proper discharge of his duty, was required to be about the main hatch upon the main deck of the vessel. During a short cessation of the discharge of the cargo, the mate of the vessel undertook to raise from the pier on the port side of the vessel to the deck of the vessel a barrel of tar. He used for this purpose the tackle and fall employed to raise the cargo from the hold. This tackle and fall were attached to a span rigged to the masts over the main hatch, the span being fastened by a guy-rope on the starboard side, so that it could not swing to port, but would raise the weight over the center of the hatch. The mate, without loosing the guy by which the span was guyed to starboard, carried the fall over the port side of the ship to the pier, and then attached it to the barrel of tar, and by horse-power raised the barrel above the rail. No guy-rope had been attached to the barrel, but two men were stationed on the rail to assist in getting the barrel to the deck. The result of this method of proceeding was that the barrel, when raised by the horse, as soon as it cleared the rail, and in spite of the efforts of the men on the rail, was pulled by the power of the horse across the deck from the rail to the hatch. At the time the barrel was thus pulled across the deck, the libellant and another man were standing on the deck between the rail and hatch near to the combings, with their backs to the rail and directly in the course taken by the barrel. Both men were struck by the barrel as it passed across the deck. One was not injured, but the libellant was knocked over the combings of the hatch and into the lower hold. No warning was given to the libellant in time to enable him to move from his position.

Upon these facts the liability of the ship is clear. The libellant's injuries arose from a neglect on the part of the owner of the ship to discharge a duty arising on navigable water out of the employment of the ship as an instrument of commerce, and owing to the libellant. The mate was in charge of the ship. His neglect was in law the neglect of the owner. It was the duty of the mate so to hoist the barrel as to prevent it from being pulled by the power of a horse across the deck where the libellant was standing. This duty was neglected

when the barrel was hoisted with the span so guyed that the barrel, when raised by the power of the horse above the rail, would be drawn by the same power out of the hands of the men on the rail and across the deck. The duty thus neglected arose upon navigable water, out of the employment of the vessel as an instrument of commerce. The case is similar in principle to the case of *The Kate Cann*, decided by this court and affirmed by the circuit court, 2 FED. REP. 241; 8 FED. REP. 719.

The libellant was guilty of no negligence. He was standing where he had the right to stand in the discharge of his official duty. If he could be chargeable with knowledge that the barrel was being hoisted from the pier at that place, he had the right to assume that it would not be pulled across the deck where he was, and no notice to the contrary was given him.

There must, therefore, be a decree in favor of the libellant, with an order of reference to ascertain the amount.

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### THE FRANCISCO GARGUILO.\*

(District Court, E. D. New York. December 7, 1882.)

#### PILOTAGE—TENDER OF SERVICES—STATE STATUTE.

A pilot who brought a vessel into the port of New York from sea became entitled under a state statute to pilot her to sea when she next left the port, by himself or one of his boat's company. The master of the vessel arranged with the pilot to meet him at a certain time and place, whence they were to go on board the vessel together. The pilot presented himself at the time and place appointed; the master did not appear, but went on board and to sea without a pilot. *Held*, that this was sufficient tender of his services on the part of the pilot, without his presenting himself on board the vessel, to charge the vessel with liability for the damages resulting from the non-performance of the obligation created by the statute.

In Admiralty.

*Butler, Stillman & Hubbard*, for libellant.

*Goodrich, Deady & Platt*, for claimant.

BENEDICT, D. J. This case comes before the court upon exceptions to the libel. The facts averred in the libel are in substance these: The libellant, John E. Johnson, being a regular licensed pilot, was employed to pilot the bark *Francisco Garguilo* from sea to the port of New York, and in fact did bring that vessel in from sea. When

\*Reported by R. D. & Wyllys Benedict.

the vessel was about to leave the port the next time, the master of the vessel arranged with the libelant to meet him at a certain time and place in the city of New York, whence, according to the arrangement, the pilot and the master were to go together on board the bark, and the bark was then to be taken to sea by the libelant. In pursuance of this arrangement, the libelant presented himself at the time and place appointed. The master did not then appear, but went on board his vessel and to sea without a pilot.

The statute of the state of New York provides that "any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port." By virtue of this statute the libelant, upon the facts stated, became entitled to take this vessel to sea on the voyage described in the libel. An obligation to employ and pay the libelant for that service was created by the statute. Upon due tender of the service by the libelant and refusal by the master to accept the same, a right of action for damages resulting accrued to the libelant. This right of action arising out of the non-performance of a *quasi* contract of pilotage is maritime in character, and may be enforced in admiralty. The case is similar, in these respects, to cases decided by the supreme court of the United States. *Steam-ship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNiel*, 13 Wall. 242.

In order to make a proper tender of his services as outward pilot for the vessel, it was sufficient for the pilot to present himself at the time and place appointed by the master to meet the pilot and take him on board. Under the circumstances stated in the libel it was not necessary for the pilot to present himself on board the vessel in order to make the tender of service complete. Nor is the rendition of some service by the pilot on board of the vessel necessary to charge the vessel with liability for the damages resulting from the non-performance of the obligation created by the statute.

There must be a decree for the libelant upon the exceptions, with leave to claimant to answer on payment of costs.

See *The Alzena*, 14 FED. REP. 175, and note.

FOLSOM v. CONTINENTAL NAT. BANK OF NEW YORK, and another,  
Security.\*

(Circuit Court, N. D. Georgia. 1882.)

## REMOVAL OF CAUSE—CONTROVERSY MUST BE SEPARABLE.

One of two defendants jointly sued in a state court cannot remove the cause into the federal court on the ground of diversity of citizenship between himself and plaintiff without showing that the controversy is separable.

## Motion to Remand.

*Reuben Arnold* and *E. N. Boyles*, for plaintiff.

*Mynatt & Howell*, for defendants.

MCCAY, D. J. The Continental National Bank of New York sued out an attachment in the state courts against Folsom, and gave Wallace as security on the attachment bond.

This is a suit brought on the bond by Folsom against the bank and Wallace in the state court. The bank, as a citizen of the state of New York, filed a petition for the removal of the cause to this court, setting up that in the cause there is no controversy whatever between it and Folsom; that Wallace, a citizen of Georgia, is merely a nominal party, and that Folsom is a citizen of Georgia. The court refused to pass the order for removal. The petitioner, nevertheless, filed papers in this court, and now Folsom sues to remand the cause to the state court. The latest case on this subject that has been reported is *Hyde v. Ruble*, 104 U. S. 408.

That was a suit on what was alleged to be a partnership contract of bailment. Certain of the alleged partners were citizens of another state, not only from plaintiff, but from Ruble, the resident defendant, and they had filed a plea that they were not partners, and that the contract had been performed. They moved the removal of the cause. The court (the chief justice delivering the opinion) decided that the second clause of section 639 of the Revised Statutes is repealed by the act of 1875. The court further decided that under the second clause of the second section of the act of 1875, to make the controversy removable in a case where all the parties on one side were not citizens of a different state from the parties on the other side, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.

\*Reported by W. B. Hill, Esq., of the Macon, Ga., bar

This is a suit on a bond—a joint bond. The plaintiff claims a right to sue all the obligors on the bond. He has a perfect right to do this; this is his cause of action. It is not against the bank, nor Wallace, but it is against both. Even if the bond were several as well as joint, the plaintiff would have a right to treat it and sue on it as a joint bond. And this he has done. The cause in 104 U. S. is much stronger than this. There, on this question of partnership, the controversy might be fairly said to be a separable one, but the court refused the petition for removal because the plaintiff's complaint in the cause of action was joint. Here there is no separate obligation to the plaintiff. The parties are bound jointly, or not at all. What would be a good defense for one would be good for the other. What would charge one would equally charge the other.

Under the ruling in the case I have referred to, I feel compelled to remand the cause. Let an order be drawn accordingly.

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### TAYLOR v. HOLMES and others.

(Circuit Court, W. D. North Carolina. October Term, 1882.)

#### 1. EQUITY—RELIEF FROM MISTAKE OF LAW.

Although a mistake of law furnishes no ground for the interference of a court of equity, yet where there is a plain, admitted, or undisputed mistake of law, arising from ignorance or inadvertence, and the mistake is mutual, equity will relieve.

#### 2. EQUITY JURISPRUDENCE—RULES WHICH GOVERN.

The federal court can take judicial notice of the laws of the several states of the Union, and in construing the constitution and statutes of a state, and the laws which regulate the rights of property in a state, it will be governed by the decisions of the highest court of the state; but upon legal questions of a more general nature, and in the principles of equity jurisprudence, a federal court is influenced but not bound by the decisions of state courts.

#### 3. EQUITY PLEADING—SUIT BY MARRIED WOMAN.

A *feme covert* must sue and be sued jointly with her husband, unless she claims a right in opposition to him, when her *prochein ami*, with her consent, may sue on her behalf, and her husband be made party defendant.

#### 4. SAME—NECESSARY PARTIES.

All parties interested in or entitled to litigate the same questions in controversy, are necessary parties, and must be joined in the suit.

#### 5. DEMURRER—WHAT IT ADMITS.

A demurrer admits only matters of fact positively alleged, and not conclusions of law, or mere pretenses and suggestions, or the correctness of the ascription of a purpose, when not justified by the fact positively alleged.

## 6. BILL—WHEN DISMISSED.

A bill in equity, where (1) there is a want of certainty in allegation to show that plaintiffs are entitled to the relief demanded; (2) the right to relief has been barred by the statute of limitations; (3) long and gross negligence of plaintiffs in seeking relief, unexplained by sufficient equitable reasons and circumstances,—will be dismissed.

## 7. FOREIGN CORPORATIONS—RIGHTS—COMITY OF STATES.

A corporation has no legal existence without the limits of the state which creates it, but where it is authorized by its charter to make contracts and acquire property for the purpose of carrying on its legitimate business, and is invested with the capacity of suing and being sued, it may by comity make contracts and acquire property in other states, and as to such contracts and property may seek the remedies afforded, and is bound by the obligations imposed by the laws of such states.

## 8. SAME—FORFEITURE OF FRANCHISE.

Causes of forfeiture do not operate *per se*, neither can they be taken advantage of collaterally, nor in any other manner than by a direct proceeding instituted for the purpose against the corporation by the sovereign which created it, and such sovereign may waive the right of forfeiture.

## 9. SAME—SURRENDER OF CHARTER.

A corporation may surrender up its charter and thus determine its existence, but there must be some definite act of surrender, and an acceptance by the sovereign or its duly-appointed agent. A mere non-user of its powers is not a surrender, nor will a court of equity be warranted in presuming a surrender from the abandonment of its franchise in intention only. There must be a declared purpose and act on the part of the corporation to justify such an inference.

## 10. SAME—DISSOLUTION—RIGHTS OF CREDITORS AND STOCKHOLDERS.

The rights and interests of the creditors and stockholders of a corporation are not extinguished or seriously impaired by its dissolution, and provisions are usually made, either in the charter or by the laws of the state of its creation, for winding up the business and securing such rights and interests.

## 11. SAME—SUIT BROUGHT BY STOCKHOLDER.

A stockholder may bring suit against the corporation of which he is shareholder, on behalf of himself and associates, in a case where the corporation refuses to bring suit, or where the directors, trustees, or other representatives are guilty of fraud, breach of trust, or are proceeding *ultra vires*, and in such case the corporation and its officers should be parties defendant.

## 12. SAME—WHAT MUST BE SHOWN.

In a suit by stockholders of a mining corporation to enforce a specific performance of a contract made by the defendants with said corporation, the plaintiffs must show when they became stockholders, and whether they entered into the original enterprise, or for a small price purchased their stock in the market after the failure of the company or the expiration of the charter, and that they requested the directors of the corporation to institute suit against the defendants, and that the directors had trust funds, or were offered proper indemnity for such legal proceedings; and the time when any of the directors died, or when and how they resigned office.

## 13. TRUST—ACCEPTANCE OF.

A voluntary or express trust cannot be imposed on any one unless he agrees to accept, or by clear implication assumes the duties and liabilities;

while acceptance in a case of an implied, resulting, or constructive trust is not necessary, the law holding him liable to the performance of such trust whether he is willing or unwilling to accept the trust.

14. SAME—CONTRACT FOR SALE OF LAND.

A binding contract for sale of land enforceable in equity, though in fact unexecuted, is considered as performed, and the land is in equity the property of the vendee. When the vendee has paid all the purchase money he has a complete equitable estate, and the vendor is a mere trustee of the legal title, and if the vendee has paid only a part of the purchase money, the vendor is a trustee to the extent of the amount paid.

15. SAME—IMPLIED TRUST—VENDOR.

Where a person, for a valuable consideration, contracts in writing to sell lands to the use and benefit of another, an implied trust arises in favor of the vendee against the vendor and his representatives, and those claiming under him.

16. SAME—STATUTE OF LIMITATIONS.

Where a trust arises by implication out of the agreement of parties, and there is no conflict of claim or adverse possession between the vendee and *cestui que trust*, statutes of limitation do not apply; but where there is a conflict of claim, and the party having the legal estate holds adversely, the statute of limitations will protect the one having the legal title, and who is sought to be converted into a trustee by a decree founded upon fraud, breach of trust, or some inequitable advantage obtained by him.

17. SAME—RULE OF PROPERTY.

Federal courts, in passing upon questions relating to property in the several states, recognize statutes of limitations, and give them the construction and effect that are given by local tribunals; and they will consider equitable rights as barred by the same limitations, where nothing has been done or said directly or indirectly to recognize such equitable claims by the adverse possessor.

In Equity.

A. B. Conger and D. M. Furches, for plaintiffs.

J. M. McCorkle, for defendants.

DICK, D. J. The general demurrer of the defendants is a denial, in form and substance, of the right of the plaintiffs to have their case considered and acted upon by the court, and is an admission of the truth of the allegations of the matters of fact set forth in the bill which are properly pleaded.

It is necessary, therefore, for the court to consider what are the allegations of material facts which are set forth in the bill; whether they are stated in direct terms and with sufficient precision to show that there is a definite equity in behalf of the plaintiffs, entitling them to the relief demanded; whether the plaintiffs have lost their right to relief by the bar of a statute of limitations, or by lapse of time, unexplained by proper equitable circumstances; and whether all necessary parties have been made, so that the court can put an end to the litigation by adjusting and settling in this suit the rights of



all persons who are interested in or affected by the subject-matter in controversy.

As there was considerable discussion by counsel as to the force and effect of a demurrer, and as to the extent that it can be made available in defense, I will state briefly some of the well-settled principles on this subject. A demurrer is applicable to any defense which may be made out from the allegations in a bill; but the most ordinary grounds of demurrer are want of jurisdiction, want of equity, multifariousness, and want of parties. By demurrer a defendant may properly insist upon staleness of claim, the statute of limitations, and long acquiescence in his adverse possession and claim.

The protestation usually inserted in a demurrer is a practice derived from the common law, and has no effect in limiting admissions as to facts properly alleged in the pending suit.

The formal statement of causes of demurrer, though usual, is not absolutely necessary. The assertion of a general demurrer is that the plaintiff has not, on his own showing, made out a case. If the causes of demurrer are not formally set forth, the plaintiff may object, and require them to be thus stated. If the defendant assigns causes of demurrer *ore tenus* he will not generally be entitled to costs; for if the objections had been formally stated, the plaintiff might have submitted to the demurrer and asked leave to amend his bill.

Where a demurrer for want of parties is filed, the demurrer should point out the proper parties, and thus give the plaintiff an opportunity to amend; but this rule does not apply where it appears from the face of the bill that the plaintiff has sufficient information as to the names, interests, and residences of the proper parties. If the objection as to parties be made *ore tenus* at the hearing, the plaintiff will be allowed to amend without costs.

In order to present clearly the questions of law discussed and decided in this case, I will give a brief outline of the material allegations in the bill.

The plaintiffs allege that they are the owners and holders of nearly three-fourths of the stock issued by the Gold Hill Mining Company, a corporation duly created and organized under the laws of New York on the thirtieth of August, 1853, for the purpose of carrying on the business of mining in the county of Rowan and state of North Carolina. The capital stock was fixed at \$1,000,000, in 200,000 shares, at \$5 a share; and the corporation was to continue for 25 years; and

its principal place of business was in the city of New York. That on the first day of September, 1853, the defendant Moses L. Holmes offered and agreed to sell the property in controversy to certain persons for the benefit of said corporation, and convey the same by unquestionable titles. The amount which he was personally to receive for such sale and conveyance was \$151,000, and 30,000 shares of the stock of the corporation. The company also agreed to pay off incumbrances to be placed on the property to the amount of \$125,000. The other defendants, being interested in the said property, agreed upon the receipt of their share of the purchase money to join in a conveyance with said Moses L. Holmes, and they all did on the fourth day of October, 1853, execute a deed to the president and directors of said company, for the consideration then stipulated and fixed at \$299,500, conveying six tracts of land, containing in all 517 acres, etc. This deed was, in some respects, imperfect, and did not convey a fee-simple title for the want of proper words of limitation to convey a fee. On the ninth day of July, 1855, the defendants executed another deed for said property to Isaac H. Smith, president, his successors and assigns, in trust that he should stand seized and possessed thereof for the benefit of the company, etc.

This deed was defective in not containing appropriate words of limitation to convey a fee as contemplated by the parties to the contracts of sale. The said Isaac H. Smith died in 1858, and never made or attempted to make a conveyance of said property.

The bill further alleges that the defendants were acting trustees and superintendents of the company from the commencement of its operations until December, 1860, when the last incumbrance was removed, the company then being left in debt over \$40,000, as the result of its operations, besides \$20,000 assessed on its stock.

The bill then alleges that the defendants, knowing that there were not proper words of limitation in the said deed to Isaac H. Smith to convey the fee, and that on his death they held the legal title as reversioners, and that they were bound to execute the trusts arising from their contracts with the company, neglected and refused to execute proper deeds to carry out such trusts, but on the tenth day of July, 1861, by threats and armed violence, did drive off the servants and agents of the company, and take possession of all the property then owned by the company at Gold Hill, convert the rents and profits to their own use, and caused the said property to be sold under attachments, and thereafter pretended that they had acquired a perfect title, and have also fraudulently suffered said lands to be sold,

and incumbered with mortgages which are clouds upon the title of the company, etc.

The bill further alleges that the company, besides the purchase money mentioned in said deeds, spent large sums in purchasing other real estate at Gold Hill, and in improvements thereon, of all which it had possession until July 10, 1861, thereafter becoming "utterly disorganized;" its directors holding no meetings after 1862, and only one of the directors now survives, and he incompetent and neglecting to protect its rights, and those of its stockholders and creditors.

The bill further alleges that the *feme* plaintiff was married in 1864, and still remains under the disability of coverture. The prayer for relief is that the defendants be required to execute proper deeds and conveyances according to their contracts with the Gold Mill Mining Company, to a trustee appointed by the court to hold to the use of the creditors and stockholders of said company; and that said defendants be compelled to account for personal property used and destroyed, and for rents and profits since July 10, 1861, etc.

When we consider the terms of the original contract of August 30, 1853, and of other subsequent contracts, and the language of the deeds of October 4, 1853, and July 9, 1855, and all the circumstances attending the whole transaction, we conclude that the manifest intent and object of all parties were that the said deeds should convey a fee-simple title to the lands mentioned, and that this intent and object were not accomplished on account of the mutual mistake of the parties, and the inadvertence or unskillfulness of the draftsman in not using appropriate words of limitation in the deeds. Although it is a general rule that a mistake of law furnishes no ground for the interference of a court of equity, yet this rule is sometimes departed from when there is a plain, admitted, or undisputed mistake of law arising from ignorance or inadvertence. *Snell v. Ins. Co.* 98 U. S. 85.

There could scarcely be a clearer case for a court of equity, if applied to by proper parties, in proper time, and in a proper manner, to interfere and furnish adequate relief by exercising its powers of correction of written instruments, and specifically enforcing contracts for the sale of land. The contracts were in writing, within the provisions of the statute of frauds; they were certain and fair in all their parts; they were founded upon valuable and adequate considerations paid and received by the respective parties. The officers of the corporation were put in possession of the premises, and expended large sums of money in buildings, repairs, and improvements; the vendors were capable, and could easily perform the agreements of the contracts, and

the errors in the deeds were caused by the mutual mistake of the parties. Nearly all the elements which constitute the equity for correction and specific performance are to be found in this transaction.

It is a well-settled principle in equity jurisprudence that where a person for valuable consideration contracts in writing to sell lands to the use and benefit of another, an implied trust arises in favor of the vendee against the vendor and his representatives, and those claiming under him as volunteers or with notice of the contract. When things are thus contracted to be done, equity treats them, for many purposes, as if they were done, and will specifically enforce such contracts by decreeing a proper conveyance, or correcting a conveyance which fails to accomplish the purposes of the parties.

The right of specific performance accrued to the corporation in this case at the time it complied with the contracts of sale, and the equitable right of correction accrued at the time of the execution of the defective deeds, on the fourth of October, 1853, and the ninth of July, 1855.

The corporation never instituted any suit for the enforcement of these clear and definite equities, and we will now consider whether the plaintiffs, by the statements in their bill, have shown themselves entitled, after so long a lapse of time and after such material changes in circumstances, to the relief which they demand.

In considering the questions involved in this suit I will notice some of the many causes of demurrer assigned, and follow, as near as possible, the line of argument adopted by the counsel of the parties.

The counsel of the defendants presents these legal propositions: "The bill shows that the Gold Hill Mining Company was created under the laws of New York, and all remedies affecting the rights of stockholders and creditors must be governed by the laws of that state, and this court, differing from the rules prevailing in state courts, takes judicial notice of the laws of New York." I assent only to a part of these legal propositions. This court can take judicial notice of the laws of the several states of the Union, and in construing the constitution and statute laws of a state, and the laws which regulate the rights of property in such state, will be governed by the decisions of its highest courts; but upon other legal questions of a more general nature, and in the principles of equity jurisprudence, a federal court is influenced by but not bound to follow decisions of state courts.

When a corporation is created by a state statute, its powers, duties, and privileges, and the mode of exercising them, must depend upon the laws of the state which created it, and it can make no contracts

and do no acts within or without such state except such as are authorized by its charter. It has no legal existence without the limits of such state. But where it is authorized by its charter to make contracts and acquire property, in general terms, for the purpose of carrying on its legitimate business, and is invested with the capacity of suing and being sued, it may, by the comity which is recognized to the fullest extent in this country, make contracts and acquire property in other states, and as to such contracts and property may seek the remedies afforded, and is bound by the obligations imposed by the laws of such states. *Bank of Augusta v. Earle*, 13 Pet. 519.

As the Gold Hill Mining Company was authorized by its charter to make contracts and acquire property for the purpose of carrying on its business, and made contracts within the scope of its authority as to real and personal property in this state, by which it acquired legal and equitable interests, its rights and remedies as to such property must be governed by the laws of this state.

It is further insisted by the counsel of the defendants that as the Gold Hill Mining Company failed or neglected to pay its debts, and suspended its lawful and ordinary business for more than a year subsequent to its disorganization in 1861, it was dissolved by virtue of the provisions of a statute of New York. 2 Rev. St. N. Y. p. 706, § 46.

I have not here referred to any decision of the highest court of that state furnishing a construction as to the force and effect of said statute, and I cannot assent to the construction insisted upon by the counsel of defendants.

Causes of forfeiture do not operate *per se*, neither can they be taken advantage of collaterally, nor in any other manner than by a direct proceeding instituted for the purpose against the corporation, so that it may have an opportunity to answer. Such proceedings can be instituted by no one but the sovereign which created the corporation, and such sovereign may waive the right of forfeiture. Proceedings to enforce forfeitures belong to the common-law jurisdiction of courts, and courts of chancery do not deal with such questions unless empowered to do so by express statute. They can deal with officers of corporations as trustees for any abuse of their trusts or failure in the performance of duty. Neither the insolvency of the Gold Hill Mining Company, nor the failure of the corporation to elect officers at the appointed time, operated as a dissolution or was a virtual surrender of its franchises. A private corporation in this country is not composed of integral parts which are essential to its existence. The

stockholders compose the company. The directors and officers are agents necessary for the active management of the affairs of the company, but they are not integral parts essential to its existence. A corporation possesses strong and tenacious principles of vitality, derived from its charter bestowed by sovereign authority, and does not cease to exist until its dissolution is accomplished in a manner provided by law.

A corporation may surrender its charter to the sovereign power that created it, and thus determine its existence, but there must be some definite act of surrender, and an acceptance by the sovereign or its duly-authorized agent. Mere non-user of its powers is not a surrender, and a court would not be warranted in presuming a surrender from the abandonment of its franchises in intention only; there must be a declared purpose and act on the part of the corporation to justify such an inference. In the charter of the Gold Hill Mining Company, and in the laws of New York, ample provisions were made to enable the company to effect a reorganization and put in operation its suspended powers. As the directors who controlled the affairs of the company in 1862 were trustees of an express trust which they had voluntarily accepted, they could not divest themselves of that trust by a resignation of office without the assent of the corporation, and before successors were appointed, and a court of equity, upon proper application, would have compelled them to have taken such steps as were necessary to secure the rights and interests of the creditors and stockholders of the company.

As the Gold Hill Mining Company was not dissolved in any manner provided or recognized by law, it remained a corporation until September 1, 1878, when its corporate existence expired by the express limitation of its charter.

The rights and interests of the creditors and stockholders of a corporation are not extinguished or seriously impaired by its dissolution. Provisions are usually made, either in the charter or by the laws of the state, for winding up the business and securing the rights and interests of the stockholders and creditors in all trading, business, and moneyed corporations. Equity regards the capital, property, and debts of such corporations as trust funds pledged for the payment of the dues of creditors and stockholders, and has ample power to reach such trust funds, and collect and apply them to the purposes of the trust. *Bacon v. Robertson*, 18 How. 480.

There was much learned discussion in the argument as to the power of stockholders to institute a suit to enforce the rights of a cor-

poration. The general doctrine on this subject, and its limitations, is well stated in *Dodge v. Woolsey*, 18 How. 331, and *Hawes v. Oakland*, 104 U. S. 450. It is well settled that a stockholder may sue the corporation to prevent or be relieved against fraud or breach of trust on the part of directors or trustees, and to restrain them from exercising powers outside of their chartered authority. As to matters which affect the rights and interest of a corporation, the general rule is, the corporation must sue to redress or prevent a wrong and secure a benefit; but a stockholder may bring a suit in behalf of himself and associates in a case where the corporation refuses to bring suit, or when the directors, trustees, or other representatives are guilty of a fraud, a breach of trust, or are proceeding *ultra vires*. In such a case the corporation and its officers or other representatives should be parties, so that they may have an opportunity of explanation and defense, and be bound by the decree, and thus prevented from bringing another suit involving precisely the same subject-matter. *Davenport v. Dows*, 18 Wall. 626.

In the case before us the charter of the corporation had expired, by effluxion of time, four years before the bringing of this suit by the plaintiff stockholders. In the case of the dissolution of a corporation, provision is made in section 9, p. 557, of the Revised Statutes of New York to authorize the existing directors or managers of such corporation, as trustees, to wind up the business of the company. From the bill in this case it appears that there were directors of the corporation at the time it suspended business in 1861, and they acted until 1862, and were in no way relieved from their duties and responsibilities by any act of the corporation, and one of such directors still survives. In a subsequent part of this opinion I will consider the question whether this surviving director is a necessary or indispensable party to this suit.

It is insisted by the counsel of the defendants that the plaintiffs, by their statements in their bill, have not shown themselves entitled to the interposition of a court of equity to grant them the relief prayed; that they have not stated positively and with sufficient certainty facts essential to their rights and within their own knowledge. They have not shown themselves to have been stockholders at the time the corporation acquired the equity which they seek to enforce, or the time when they became stockholders; whether they paid par value for their stock, or purchased it when it was greatly depreciated by the indebtedness, embarrassment, and disorganization of the company, or became owners of such stock after the expiration of the

charter. They have not shown that they made any effort to reorganize the company, which they could easily have done under the laws of New York, and by the chartered powers of the corporation, as they were the owners of a large majority of shares of stock. They have not shown that they requested the directors or trustees of the corporation to institute suit for the enforcement of their rights. They have shown that the corporation was largely indebted in 1860, and have not shown that the directors had sufficient corporation funds to carry on proper litigation, or that means and suitable indemnity were offered to such directors. They have not shown that they at any time made earnest or even reasonable efforts for the redress of grievances complained of during the existence of the corporation, or with the trustees upon whom the rights of the corporation devolved upon its suspension of business or its dissolution.

These suggestions, made by the counsel of defendants, have received my careful consideration, and I regard them as having a material bearing upon the case, and I will state my conclusions upon the subject in a subsequent part of this opinion.

The chief causes of demurrer relied upon by the defendants to defeat the suit of the plaintiffs are the statute of limitations, lapse of time, and staleness of claim.

In passing upon these questions it becomes necessary for me to consider the nature of the trust which existed between the defendants and the corporation arising out of the contracts and transactions between the parties in relation to the property in controversy. A binding contract for the sale of land enforceable in equity, though in fact unexecuted, is considered as performed, and the land is in equity the property of the vendee, and will devolve in a course of descent upon the heir of the vendee. When the vendee has paid all the purchase money he has a complete equitable estate, and the vendor is a mere trustee of the legal title. If the vendee has paid only a part of the purchase money, then the vendor is a trustee to the extent of the money paid, and the vendee cannot demand the legal title until he has complied with the terms of the contract; but still there is an implied trust arising out of the presumed intention and consent of the parties that the vendor will make a transfer of the legal title when the balance of the purchase money is paid. In the case of a trust arising by implication out of the agreement of parties, as there is no conflict of claim or adverse possession between the trustee and *cestui que trust*, statutes of limitation do not apply until these consistent relations of the parties are changed into conflicting and adverse claims.



In the case of a constructive trust there is always some conflict of claim, and the party having the legal estate holds adversely, and does not become a trustee until he is converted into one by a decree founded upon fraud, breach of trust, or some inequitable benefit or advantage obtained by a person occupying a fiduciary relation to another.

In such cases of constructive trusts the statute of limitations will protect one who has the legal title and is sought to be converted into a trustee against his assent, and it begins to run from the time when the equitable rights of the other party accrued. *Taylor v. Dawson*, 3 Jones, Eq. 86.

The written contracts in this case did not create an express trust. There were no direct and express terms of trust imposed by the makers. Voluntary or express trusts cannot be imposed upon any person unless he agrees to accept or by clear implication assumes the duties and liabilities. Acceptance of a trust in the case of an implied, resulting, or constructive trust is not necessary, as the law holds a person liable to the performance of such trust, whether he is willing or unwilling to accept the situation.

It is insisted by the plaintiffs that in this case there is a constructive trust arising out of the fraudulent conduct of the defendants, and that length of time will not operate as a bar to a suit in equity where such fraud is admitted by the demurrer of the defendants. To sustain this position there must not only be shown an established trust, but some actual and intentional fraud practiced upon a *cestui que trust* by a trustee, which has been concealed from the *cestui que trust*. *Clarke v. Boorman*, 18 Wall. 493; *Godden v. Kimmell*, 99 U. S. 201.

A demurrer only admits matters of fact positively alleged, and not conclusions of law or mere pretenses and suggestions, nor the correctness of the ascription of a purpose to parties when not justified by the language used and facts positively alleged. *Dillon v. Barnard*, 21 Wall. 430.

The mere allegation in the bill that the defendants knew of the existence of the legal defects in the said deed, and neglected and refused to rectify the same, is not sufficient to imply constructive fraud, as the agents of the corporation had full knowledge of the defect or the means of such knowledge in their hands. There is no direct averment that the defendants were ever requested to rectify such deeds. The error in the deed was a plain mistake of a clear and well-settled principle of law, and it is upon the ground that there was a mutual mistake of law, caused by ignorance or inadvertence, that the plaintiffs can claim the interference of a court of equity to

grant relief. Ignorance of law by one party to a contract is not generally a ground for relief in equity, as a party to a contract is presumed to know the law which affects his rights and obligations.

In the matters of fact positively alleged in this case there are none of the elements of actual and intentional fraud. The defendants did not misrepresent any material matter to produce a false impression, or in any way mislead the agents of the corporation to obtain undue advantages.

There was no evil act with an evil intent. They did not conceal any material facts or remain silent as to any. The want of proper words of limitation in the deeds to convey a fee-simple title to the lands was as well known to the agents of the corporation as to the defendants, or such agents might easily have acquired information as to such defects, as the deeds were duly accepted and registered by them, and constituted a link in the chain of title to lands in which they had undisturbed possession for more than six years.

No statute of limitations began to run against the corporation while its agents were in possession, and the defendants, as implied trustees, had not disputed the equitable rights of the corporation, or set up any adverse claim. When the defendants took forcible adverse possession of the lands and other property in 1861, the statute of limitations had been suspended in this state by legislative enactments, and remained suspended until January 1, 1870. From that date the statute of limitations began to run in favor of the defendants, as they held the possession of the lands adversely to the Gold Hill Mining Company. As possession was thus held adversely for more than seven years under the legal title, and with known and visible boundaries, the legal and equitable claims of said corporation were barred. Bat. Rev. 147.

As such corporation was agent and representative of the stockholders, who were entitled to rights and interests by and through the corporation, I am inclined to think that the stockholders were also barred, and the coverture of the *feme* plaintiff did not prevent the bar as to her rights. *Wellborne v. Finley*, 7 Jones, 228; 2 Perry, Trust. § 458; *Herndon v. Pratt*, 6 Jones, Eq. 327; *Kerrison v. Stewart*, 93 U. S. 155.

The fact that the plaintiffs were non-residents of the state did not prevent the operation of the statute of limitations, (*Harris v. Harris*, 71 N. C. 174,) and this construction of the statute was adopted by the supreme court of the United States in *Davie v. Briggs*, 97 U. S. 628.

The force and effect of the statute of limitations was not only to bar the remedy of the corporation, but to extinguish its rights, and vest a perfect title in the adverse holders.

Federal courts, in passing upon questions relating to property situated in the several states, recognize statutes of limitations, and give them the same construction and effect that are given by the local tribunals.

When a statute of limitations applies to a legal proceeding or a legal right, courts of equity will in analogous cases consider equitable rights as barred by the same limitations, where nothing has been done or said directly or indirectly to recognize such equitable claims by the adverse possessor. *Elmendorf v. Taylor*, 10 Wheat. 152.

A statute of limitations, where it applies, is an absolute bar, and allegations of justness of claim, ignorance, or any kind of hardship cannot avoid its operation. If such circumstances were allowed to control, there would be no end to litigation and no certain rules of property. 2 Perry, Trust. 484.

Statutes of limitation are founded in a wise and salutary public policy, and promote the peace and well-being of society by quieting titles to property, and putting an end to stale demands.

It was insisted by the defendants that, without reference to any statute of limitations, courts of equity have adopted the principle that unreasonable delay in the assertion of a right by suit will defeat recovery or relief, and questions as to laches and lapse of time are to be determined by the particular circumstances of each case. We will briefly consider this matter, as it was elaborately discussed by counsel on both sides of the case.

In 1855, upon the execution of the defective deed to Isaac H. Smith by the defendants, the corporation had a clear and definite equity for the correction of said deed, as it was founded upon a large, valuable, and adequate consideration, and the defects in the conveyance resulted from a mutual mistake of the parties. The corporation, through its officers and agents, took possession of the premises, made large expenditures for improvements, and continued to exercise control over the property until 1861. At this period it was so much embarrassed by debts that it was unable to carry on its business and became "completely disorganized."

These embarrassments could not then be relieved by any efforts of the stockholders, as most of them were citizens of the northern states, and were excluded from the limits of this state by the disturbed condition of public affairs produced by a civil war. It is alleged that

the defendants, who were stockholders, and had been directors and managers of the business of the corporation, with armed violence took possession of the property and drove off the agents of the corporation, and have continued to this time to hold possession, receive rents and profits, and have mortgaged and otherwise dealt with the property as absolute owners.

Upon this statement of facts, if the plaintiffs, in their bill, had shown any plausible reason for their long delay in asserting their rights, and if lapse of time was the only defense interposed by the defendants, I would overrule the demurrer and require them to answer such grave charges of injustice, wrong, and oppression against the absent stockholders with whom they had been associated in fiduciary and friendly relations.

It appears from the bill that about 500 acres of land were purchased from the defendant for mining purposes; that the capital stock of the company was fixed by the charter at \$1,000,000, in shares of \$5 each; that the business was regularly carried on for more than six years; that the company in December, 1860, owed \$40,000 of indebtedness, and had not sufficient available assets to discharge the same; and that the company became "utterly disorganized" and ceased to exercise its corporate functions.

We may well infer from these facts and circumstances disclosed in the bill, and from the history of such hazardous enterprises, that the mining venture of the company became a failure, that the land became greatly depreciated in value, and the large amount of shares of stock which were issued became almost worthless, and could be purchased at a nominal value. We may also well infer that the creditors of the company made some efforts to collect or secure their debts out of the general wreck of the hazardous and unfortunate enterprise. After such long delay in asserting their rights, the plaintiffs ought to show some equitable reason for such delay, and substantial merits to repel such unfavorable inferences.

The plaintiffs have not shown when they became stockholders; whether they entered into the original enterprise, or for a small price purchased the stock in the market after the failure of the company or after the expiration of its charter. If they were stockholders in 1861, at the time of the disorganization of the company, they have not shown that they made any effort to reorganize the company, which they could easily have done under the provisions of its charter and the laws of New York.

The disturbed condition of public and private business which prevailed in this state during the civil war did not prevail in New York, where the corporation had its chartered existence and where most of the holders of stock resided. After the termination of the civil war in 1865 the state and federal courts were open for the administration of justice, and the rights of property, of which the plaintiffs were temporarily deprived by the armed violence of the defendants, could easily have been restored by the courts, or the military power that prevailed in this state for three years. The rights of property of citizens of the northern states were not affected by the statutes of limitations, or legal proceedings in the courts of the insurrectionary states during the civil war.

As the plaintiffs have not set forth their claims with sufficient certainty, and have not assigned any reasons why they have so long slept upon their rights, they cannot properly complain at the operation of well-settled principles of equity jurisprudence upon the subject which have been adopted and are enforced for the peace and well-being of society. *Badger v. Badger*, 2 Wall. 87; *Hawes v. Oakland*, 104 U. S. 450.

There can be no fixed and definite rule established by a court of equity as to what delay in asserting a right will amount to an equitable bar from lapse of time, as there are different circumstances and elements involved in each case. I think, however, that the principle insisted upon by the counsel of defendants in his brief is well sustained by reason and authority; that "in mining property, which is hazardous, uncertain, and speculative, greater diligence is required in asking for the specific performance of contracts relating to mining lands than to other lands." *Leading Cases on Mines, etc.*, 397; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587.

As my decision in this case may be reviewed in the supreme court, I feel it to be just to the defendants to consider other causes of demurrer which have been assigned.

The defendants insist that this bill cannot be sustained in behalf of the *feme* plaintiff, as it appears that she is a *feme covert* suing in her own name, and her husband is not made a party. The rules of equity pleading upon this subject are too familiar and well settled to need discussion or much citation of authority. A *feme covert* must sue and be sued jointly with her husband, unless she claims a right in opposition to him, in which case her *prochein ami*, with her consent, may exhibit a bill in her behalf, and her husband be made a

party defendant. Courts of equity will in some cases recognize a *feme covert* as capable of disposing of her separate property and doing other acts as a *feme sole*. She may in some instances act as a trustee, or execute a power, without the concurrence of her husband, if such act does not defeat a right of the husband, or impose a legal responsibility upon him. But in all suits in equity in which a *feme covert* sues or is sued, the husband must be a party plaintiff or defendant whenever he is within the jurisdiction of the court and can be made a party. Story, Eq. Pl. § 63; 2 Story, Eq. Jur. § 1368.

The rules of equity pleading upon this subject are not affected in any manner in this court by the right which a *feme covert* may have to institute suits in her own name, under state laws, as the practice act of 1872 (Rev. St. § 914) does not apply to the pleadings and modes of procedure in federal courts of equity. *Blease v. Garlington*, 92 U. S. 1.

The bill does not show whether the interests of the *feme* plaintiff are adverse to, or in conformity with, those of her husband. If it appeared that she is suing for her separate estate and the husband refused to join with her in the suit, I would allow a proper amendment, so as to introduce a *prochien ami* and make her husband a defendant; and this amendment would not oust the jurisdiction of the court on account of the same citizenship of the parties, as the husband defendant would be only a formal party. *Wormly v. Wormly* 8 Wheat. 451.

If, however, the husband has a substantial adverse interest to the *feme* plaintiff, then such amendment could not be allowed. The husband is an indispensable party to a suit in equity where the wife sues or is sued, and his non-joinder is sufficient cause for the dismissal of a bill, if an amendment making him a party cannot properly be allowed.

It is a general rule in equity that all parties interested in or entitled to litigate the same questions in controversy are necessary parties. They must be expressly made parties, or the bill must be so framed as to give them an opportunity to come in and be made parties. This principle is only departed from when it is extremely difficult or inconvenient to enforce this rule. This general principle has in some degree been modified by section 733, Rev. St., and the twenty-second and forty-seventh rules adopted by the supreme court for the regulation of the practice of United States courts of equity. By virtue of this statute and these rules courts of equity may dispense with merely formal parties; and in cases where the real merits

of the cause may be determined without essentially affecting the interests of absent parties, whose interests are separable from the other litigants, it may be the duty of such courts to make a decree as to the parties before them. But neither the act of congress nor the rules of the supreme court enables the circuit court to make a decree in equity in the absence of an *indispensable* party whose rights must necessarily be affected by such decree.

This principle is founded upon the broad ground of natural equity and justice that prevails in all systems of enlightened jurisprudence, that no court ought to adjudicate directly upon a person's rights without the party being either actually or constructively before the court, with opportunity for explanation and defense.

Although it is a general rule in chancery that a bill will not be dismissed for the want of proper parties, yet if, upon the hearing of a bill, the court sees that an indispensable party is not on the record, and cannot be made a party without ousting its jurisdiction, it will refuse to proceed, and dismiss the bill. *Shields v. Barrow*, 17 How. 130; *Bank v. Railroad*, 11 Wall. 624.

There are other questions which were presented in the pleadings, and they were insisted on in the argument, as to what were the rights and interests of the creditors of the corporation for whom relief is asked in the prayer of the bill; and what were the rights, duties, and responsibilities of the directors of the Gold Hill Mining Company.

All the rights, interests, and property of an insolvent or dissolved corporation constitute a trust fund, and are held,—*First*, for the payment of creditors; and, *second*, for the benefit of the stockholders.

It appears on the face of the bill that at the time the corporation suspended the exercise of its functions and franchises in 1861 there were creditors to the amount of \$40,000, and there were no available assets for immediate payment. There was an assessment on the stock to the amount of \$20,000, but it does not appear that the same was collected and applied in payment of debts.

It in no way appears that the prior and exclusive equities of creditors have ever been adjusted and discharged by the corporation assets. Under such circumstances it seems to me that this court cannot proceed to make a decree as to the secondary and subordinate equities of the stockholders to the property of a once insolvent and now dissolved corporation, unless the existing creditors (if there be any) are in some way represented in this suit. This is a stockholder's bill, and they cannot properly represent the rights and inter-

ests of creditors, which are not identical with those of the plaintiff, but different, superior, and conflicting. But for the prayer in the bill for relief in behalf of creditors, I would suppose that all the claims of the creditors had been satisfied and discharged under proper legal and equitable remedies afforded by the courts, or had been barred by the statute of limitations. The creditors could have reached the property of the corporation by legal and equitable process and I cannot imagine any reason why they should have slept upon their rights for 20 years. If the property was sold under proper legal process the purchasers acquired good titles. If the defendants, who were trustees, purchased the property (as is intimated in the bill) at a fair and open sale under legal process, and at the highest price that it would bring at auction, this transaction was neither fraudulent nor void. It may be that on account of their fiduciary relation to the corporation and the stockholders they might in a reasonable time have been declared trustees for the *cestuis que trust*. In such cases the *cestuis que trust* must seek their relief in reasonable time, and we have already considered sufficiently the facts and circumstances of this case as to the reasonable diligence of the plaintiffs in seeking relief. *Twin Lick Oil Co. v. Marbury*, *supra*.

It appears in the bill that there were directors in 1861 when the corporation suspended business, and that they continued to act until 1862, and they were not discharged from their duties and responsibilities in any manner provided in the charter or the laws of the state of New York. As directors they were strict trustees of the creditors and stockholders, and it was their duty to have taken care of the corporate property under their control, and to have maintained the rights and consulted the advantages of their *cestuis que trust* by instituting proper legal proceedings to enable them to perform the duties of the trust with which they were invested.

The bill does not allege that the directors were requested to institute suit against the defendants, or that they had the trust funds, or were offered proper indemnity for such legal proceedings. It was the duty of the directors or trustees to have rendered proper accounts of their transactions, showing what disposition they had made of the property under their control.

When a direct trust is unclosed the statute of limitations does not protect trustees or their legal representatives from liability.

As the directors were strict trustees, and voluntarily accepted the trust, they could not divest themselves of the trust by a resignation.



unaccepted by the *cestuis que trust*, unless some other method was provided in the charter or by the laws of the land.

The bill does not show when any of the directors died, or when or how any of them resigned office. If the trust of the directors was continued by a failure of the corporation to elect other directors as successors in office, then it may be that the directors who were living in 1878, when the corporation was dissolved by the expiration of its charter, became trustees of the rights and property of such corporation by virtue of the statute of New York. 1 Rev. St. § 9, p. 557.

The allegations in the bill are admitted by the defendants, so far as they are affected by such allegations; but such admissions do not dispose of the rights and responsibilities of the directors and their legal representatives, who are not parties.

It seems to me that the directors or their legal representatives ought to be made parties, so that they may have an opportunity of being heard, and have the whole subject-matter in controversy so adjusted and settled by a decree of this court as to free them from the duties and liabilities of future litigation.

I will not further consider or determine this question, as there are other sufficient causes for the dismissal of the bill.

I will dismiss the bill on the following grounds:

- (1) Want of certainty in allegation to show that the plaintiffs are entitled to the relief demanded.
- (2) The right to relief has been barred by the statute of limitations.
- (3) The long and gross negligence of the plaintiffs in seeking relief, unexplained by sufficient equitable reasons and circumstances.

It is ordered that the bill be dismissed, with costs.

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### WALKER and others v. COLBY WRINGER Co. and another.

(Circuit Court E. D. Wisconsin. October Term, 1882.)

#### 1. EFFECT OF WORDS "HEIRS," ETC., INSTEAD OF "SUCCESSORS," ETC., IN A DEED.

Execution levy was made upon certain lands to satisfy a judgment recovered in an action on a bond, with surety, taken upon the representations that one of the defendants was possessed of valuable land in her own right. The principal on the bond was a minor, and the judgment was against the surety alone. A suit was brought by the complainants herein asking for an injunction restraining the sale of the lands of which they claim to be the owners. In the deed to the land in dispute the defendant in the former suit appears as the grantee, named

in her representative capacity as the guardian of the complainants herein, but in the *habendum* clause of the deed the words "her heirs and assigns" appear instead of "successors;" and the main question being in whom is the title of the lands vested, *held*, that the word "heirs," used instead of successors in the printed part of a deed, should not control or qualify the other parts of the instrument; the test being that, in equity, the party could not hold the title in fee in hostility to the heirs, nor could she maintain such a right at law, relying upon the terms of the deed.

2. TRUSTS—STATUTORY.

Sections 2081 and 2090 of the Revised Statutes of Wisconsin refer to trusts created by the instrument declaring them.

3. GUARDIAN AS TRUSTEE.

A guardian is trustee under the statute by virtue of which he is appointed.

4. EXECUTION.

Execution can only be levied on the property of the one against whom the judgment stands. Equity cannot relieve in the application of a purely legal remedy.

5. CLOUD ON TITLE—RESTRAINING SALE UNDER EXECUTION.

A court of equity, in order to prevent a cloud upon the title to land, will, in a proper case, restrain the sale thereof.

In Equity.

J. C. McKenney, for complainants.

J. P. C. Cottrill, for defendants.

DYER, D. J. The bill in this case prays for an injunction restraining the sale of certain lands, of which the complainants claim to be the owners, and which have been made the subject of execution levy to satisfy a judgment heretofore recovered in this court by the defendant the Colby Wringer Company against one Caroline Walker.

The material facts of the case are as follows:

Prior to July, 1879, one Emery S. Walker was the agent of the Wringer company for the sale of clothes wringers at Milwaukee. At about the time stated, it was arranged that he should retire from the agency, and that the complainant Jesse W. Walker should be appointed in his stead. The appointment of Jesse W. Walker was, however, to be upon the condition that he should give a bond, with surety, for the payment to the company of the proceeds of goods sold to the amount of \$1,500, and Caroline Walker offered to become such surety. The company thereupon took measures to ascertain the extent of her pecuniary responsibility, and, upon the strength of representations made by Jesse W. Walker to the retiring agent, the latter informed the company that Caroline Walker was the owner of property valued at \$4,000. The Wringer company was also referred to persons acquainted with Mrs. Walker for further information touching her pecuniary condition, and was advised by letters received from such persons—which it is proved were in fact written by Plummer S. Walker, the husband of Caroline Walker—that Mrs. Walker owned real estate and personal property in her own right worth from \$3,500 to \$5,000.

The proofs show clearly enough that through the instrumentality of Jesse W. Walker, Caroline Walker, and her husband, Plummer S. Walker, the Colby Wringer Company was led to believe that she was a person of adequate pecuniary responsibility; and the result was that the company accepted a bond or guaranty executed by Jesse W. Walker and Caroline Walker as security for the punctual payment by him of all book-accounts or notes given for goods furnished him by the company, to the extent of \$1,500. Thereupon Jesse W. Walker entered upon the business of his agency, and continued in the same until 1880, when he retired from the agency a debtor to the company in about the sum of \$1,500.

It appears further that Calvin W. Walker was the first husband of Caroline Walker, and the father of complainants. He died in April, 1863, leaving real estate of which complainants became the owners by descent as his heirs at law. Caroline Walker was their guardian and made sale of the property. The proceeds were loaned to Plummer S. Walker, who had become the husband of Caroline Walker, and as he subsequently became unable to make repayment in money, he conveyed to Mrs. Walker certain lands in Outagamie county to make good the amount he had so borrowed. The conveyance was made on the twenty-ninth day of July, 1873, and recites that it is an indenture between P. S. Walker and his wife, Caroline Walker, as parties of the first part, and Caroline Walker, as the guardian of the minor heirs of Calvin W. Walker, party of the second part. In the body of the deed there is a recital that the grantors "give, grant, bargain, sell, remise, release, and quitclaim to the party of the second part, and to her *heirs and assigns, forever*," the lands described; and in the *habendum* clause are also the words "the said party of the second part, *her heirs and assigns, forever*." These lands held by Caroline Walker under this conveyance constituted the real estate which the Colby Wringer Company supposed, from the representations before referred to, was owned by Caroline Walker in her own right.

At the time business relations were established between the Wringer company and the complainant Jesse W. Walker, and from that time until his agency was closed, he was a minor; but of this fact the company had no knowledge until the thirteenth day of November, 1880, when he gave to the company notice in writing that he elected to disaffirm the bond or guaranty executed in July, 1879, by himself and Caroline Walker, on the ground that at the time of the execution thereof he was a minor, under the age of 21 years. Subsequently

the Colby Wringer Company brought a suit in this court against Caroline Walker upon the guaranty, and on the twenty-first day of February, 1881, recovered judgment against her for the sum of \$1,500 and costs. Execution was issued on the judgment, and the lands before mentioned were levied on as the property of Caroline Walker, by the defendant Fink, who is marshal of this district. Thereupon the present bill for an injunction was filed to restrain the sale of the lands, on the ground that the complainants are the owners thereof, and that said lands are not subject to seizure and sale as the property of Caroline Walker.

Since the judgment sought to be collected is against Caroline Walker alone, the judgment creditor is restricted, so far as the enforcement of purely legal remedies is concerned, to such property, or such interests in property, as she holds in her own right. The proceeding by execution, resorted to by the plaintiff in the judgment, is an assertion of a strictly legal right. It is not in any sense a proceeding in equity to reach equitable interests. Necessarily, therefore, the first question is, in whom is the title to the lands in question vested?

The claim of the defendant's counsel is that the conveyance of the lands from Plummer S. Walker vested the title in fee in Caroline Walker; and it is urged that this contention is supported by the clauses in the body of the deed, wherein the words "her heirs and assigns, forever," are used. It is claimed that the granting clauses of the deed control the preceding part thereof, wherein the grantee is described as the guardian of the minor heirs of Calvin W. Walker. In view of the proofs on the subject, there can be no doubt that Calvin W. Walker died seized of real estate which on his death became the property of complainants; and that, as an equivalent for the proceeds of that property, which had been used and lost by Plummer S. Walker, the lands in question were conveyed to Caroline Walker for the benefit of the heirs of Calvin W. Walker, of whom she was the legally-constituted guardian. It was the evident intention of the parties to convey the lands to her as such guardian. As grantee in the deed she is named in her representative capacity. The language of the instrument is: "This indenture, made the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy-three, between P. S. Walker and his wife, Caroline Walker, of Maple Creek, Outagamie county, Wisconsin, parties of the first part, and Caroline Walker, as the guardian of the minor heirs of Calvin W. Walker, of the same place, party of the second part." The

consideration of the deed, by the terms thereof, run from her as the party of the second part; that is, as a grantee receiving the title, not in her individual right, but in her representative character. It is true that in the subsequent clauses of the deed the word "heirs" is used instead of the word "successors," but I do not think the use of that word, in the printed part of the deed, should be held to control or qualify the other parts of the instrument to which reference has been made, and to confer upon her, in her individual right, the legal title. Certainly, in equity, she could not hold the lands under claim of absolute title in fee, in hostility to the heirs, nor do I think she could maintain such a right at law relying upon the terms of the deed.

But it is still further urged that if the conveyance was intended by the parties to be one in trust to Caroline Walker, it is inefficacious as a trust deed because the trust in favor of Jesse W. Walker and Mary P. Walker is not fully expressed and clearly defined on the face of the instrument, as required by section 2081 of the Revised Statutes of Wisconsin, and therefore that under section 2090 of the same Revision the conveyance must be deemed absolute as against the creditors of Caroline Walker. But these statutes apply only to such trusts as are created by the instruments declaring or attempting to declare them. Here the trust is not created by the deed. A guardian is a trustee under the statute by virtue of which he is appointed. The appointment of Mrs. Walker as guardian of the complainants made her their trustee. This is her *status* under the law, and therefore the statutory provisions referred to are not applicable. When she took the conveyance in question as guardian, she became seized of the property as a trustee, and it was not necessary that the trust should be fully expressed or defined in the instrument of conveyance. On the whole, my opinion is that Mrs. Walker took the title of the lands levied on, not in her individual right, but as guardian of the complainants, and that she has no interest therein subject to levy and sale for satisfaction of the judgment against her.

But it is further contended that the debt represented by the judgment against Mrs. Walker was really the debt of Jesse W. Walker; that he was a party to the representations in relation to the ownership of this land, on the faith of which Mrs. Walker was accepted as a surety on his guaranty to the company; that he should therefore be now estopped to say that the land belongs to him; and that it is at least equitable that his interest in the property should be subjected to the payment of the judgment. There is force in these suggestions,

and in view of the inducements held out to the Wringer company, to which Jesse W. Walker was a party, and which, when considered in connection with what ultimately followed, were, in the eye of the law, little less than a fraud, the court would be strongly inclined to sanction the enforcement of this judgment against Jesse W. Walker's interest in the land if it could do so consistently with legal principles. An insuperable difficulty in the way is that, although the original debt was that of Jesse W. Walker, the judgment is against Caroline Walker alone. The remedy now sought by the plaintiff in the judgment is a purely legal remedy; *i. e.*, an execution sale of the land as the property of the judgment debtor. The court cannot aid that proceeding by the application of equitable remedies, strong as the equities may be in favor of the judgment creditor. Jesse W. Walker is not one of the judgment debtors, and, *ex necessitate*, execution on the judgment must run against the property of Caroline Walker. Moreover, Jesse W. Walker was a minor when he became a party to the written guaranty, and when he contracted the indebtedness owing to the Wringer company. No suit could be maintained or judgment recovered against him while he was a minor, on account of his indebtedness to the company, if he pleaded infancy, and on obtaining his majority he disaffirmed the contract of guaranty. It seems obvious, therefore, that the case is one in which the principle of estoppel cannot be invoked or applied in support of the judgment creditor's right to enforce by execution its present judgment against the property of Jesse W. Walker. If his interest in the land can be reached in any form of proceeding, it is evident that it must be done in such form as will enable the creditor to invoke the equitable interposition of the court. In no event can the interest of Mary P. Walker be divested or affected by any proceeding to enforce payment of the liabilities of Caroline or Jesse W. Walker. The attempted sale of the land in question to satisfy the judgment against Caroline Walker would create a cloud on the title, and a court of equity, by virtue of its inherent power as such, in order to prevent a cloud upon the title to land, will, in a proper case, restrain a sale thereof.

There must be a decree enjoining a sale of the land in question upon the judgment against Caroline Walker, but the decree will be entered without prejudice to the right of the Colby Wringer Company to take any proceeding in equity it may be advised is proper to subject the interest of Jesse W. Walker in the land in question to the payment of his indebtedness to the company. Costs will not be allowed to the complainants against the defendants herein.

## UNION MUT. LIFE INS. CO. OF MAINE v. DICE and another.

*(Circuit Court, D. Indiana. 1882.)*

## 1. STATUTE OF LIMITATIONS—WHEN NOT AVAILABLE AS A BAR.

A debtor who procures and keeps in force an injunction against the collection of a debt which he ought to pay until it is barred at law by the statute of limitations, will not be allowed to avail himself of the bar in a court of equity.

## 2. SAME—PURCHASER AT TAX SALE—REMEDY OF.

Where, under the state statute, the purchaser at a tax sale can bring no suit for possession after the lapse of five years from the time of the sale, nor can the owner after that time question the validity of the sale, and such purchaser has been prevented from asserting his legal rights in a court of law by unfounded and protracted litigation until the statute has run against him, he is not remediless in a court of equity.

In Equity.

*Claypool & Ketcham*, for complainant.

*Calkins & Harris*, for respondents.

GRESHAM, D. J. The lands described in the bill of complaint were sold to the respondents, Dice and Long, for non-payment of taxes, and after the lapse of two years, without redemption, the proper officer executed a deed to the purchasers. Prior to the sale the owner had executed to the complainant a mortgage on these lands to secure a loan. This mortgage was foreclosed after the tax sale, Dice and Long not being made parties; and at the foreclosure sale the complainant became the purchaser, and in due time received a deed. Some time after both this deed and the tax deed had been executed, suit was commenced in one of the state courts against the complainant by the respondents, to quiet their title to the premises. The only notice that was given of the pendency of this suit was by publication. The complainant was defaulted, and a decree was entered against it, quieting the title in the respondents. Subsequently the complainant appeared in the state court, and in a proper proceeding under the Code had this decree vacated. Including the time the decree of the state court was in force, more than five years elapsed after the tax sale before this suit was commenced; but excluding that time, the suit was commenced within five years.

The bill alleges that the tax sale was illegal, because the owner of the lands at the time had abundant personal property in the county out of which the taxes might have been made, and that no demand or other effort was made to make such taxes out of such property; that the tax assessment was excessive; that the respondents have

been in possession of the premises since the sale; and that the rents and profits exceed the amount of taxes paid by the respondents since their purchase. The prayer is for an accounting, and a decree quieting the title in the complainant.

In their plea, the respondents aver that at the time of the tax sale the owner of the premises was a non-resident of the state, owning no personal property within it; that they have been in possession of the lands uninterruptedly since their purchase; and that this suit was not brought within five years after the tax sale. The statute which is relied on in this plea reads thus:

"No action for the recovery of real property sold for the non-payment of taxes, shall lie, unless the same be brought within five years from the sale thereof, for taxes as aforesaid, anything in the statute of limitations to the contrary notwithstanding." Davis, Rev. St. 127.

And a debtor who procures and keeps in force an injunction against the collection of a debt which he ought to pay, until it is barred at law by the statute of limitations, will not be allowed to avail himself of the bar in a court of equity.

A party who, by unfounded and protracted litigation, has been prevented from asserting his legal rights in a court of law until the statute of limitations has run against him, is not remediless in a court of equity. *Wilkinson v. Flowers*, 37 Miss. 579; Story, Eq. § 1521.

But Dice and Long were purchasers at a public sale; there was nothing fraudulent in their purchase, and it cannot be said that they were bound to notify the owner of the lands, or his mortgagee, of their claim or title. The premises might have been redeemed at any time within two years after the tax sale, by paying the delinquent taxes, damages, etc. Why this was not done does not appear from the bill, nor does it appear upon what grounds the decree of the state court, quieting the title in Dice and Long, was vacated. It may have been, and likely was, on the ground that the complainant was a foreign corporation, and had no actual notice of the pendency of the suit. The parties were all before the state court when the complainant appeared and had the decree set aside. This was less than five years after the tax sale. There was nothing to prevent the complainant from asserting in that suit, by cross-bill, the same right that is asserted here. It cannot be said that the bringing of the suit in the state court, and the taking of the decree and allowing it to stand in force, without personal notice to the insurance company, was a fraud upon that company.



The rule in equity is that as soon as a party has a right to apply to a court of equity for relief, the statute begins to run against him. Story Eq. § 1521a. The statute above quoted commenced to run at once after the sale, and by its terms the purchaser can bring no suit for possession after the lapse of five years from the time of sale, nor can the owner question the validity of the sale after that time. Any suit affecting the title is a suit for recovering the property, within the meaning of the statute. *Barrett v. Love*, 48 Iowa, 108.

The plea is sustained.

### CHICAGO, M. & ST. P. RY. CO. v. MINNESOTA CENT. R. Co. and another.

(*Circuit Court, D. Minnesota.* 1882.)

#### 1. RIGHTS OF RAILROAD COMPANIES UNDER CITY ORDINANCE.

A railroad company having submitted to construct its road through a city under an ordinance reserving the right to alter and amend, must submit to such alterations, etc., as are reasonable and necessary. But such an ordinance shall not be amended or repealed so as to affect essential and vested rights, or be allowed to act retrospectively to take away rights previously granted.

#### 2. CONDITIONS SUBSEQUENT.

Conditions subsequent are not held in favor by courts of equity, and they will not enforce them unless the contract clearly compels it.

#### 3. CITY ORDINANCE—COVENANT IN—BREACH OF.

The breach of a covenant contained in a city ordinance will not authorize the common council to divest any estate granted by such ordinance

#### In Equity.

The Minnesota & Pacific Railroad Company was authorized by the legislature of the territory of Minnesota to construct a railroad from the city of Winona, in this state, up the valley of the Mississippi river, to the city of St. Paul. The present complainant has succeeded to all the rights of said company, and obtained all the power and authority which was granted to the Minnesota & Pacific Railroad Company by its charter for constructing this road. Among the chartered rights of the Minnesota & Pacific Railroad Company was the authority to construct its road and branches "upon, along, across, over, or under any public highway, road, or street, if the same shall be necessary." The immediate successor of the Minnesota & Pacific Railroad Company to the right to construct the Winona branch, so called, was the St. Paul & Pacific Railroad Company, and this branch

was afterwards designated as the St. Paul & Chicago Railway Company, the immediate successor of the present complainant. This branch was constructed by the St. Paul & Chicago Company, and as the city of Red Wing, on the line of the road, was reached, the company was proceeding to build its road through the southern portion of the city, when, at the instigation of the city authorities, an arrangement was made under which the company agreed to change its route to the northern portion of the city, near the river, and the following ordinance was passed by the common council of the city, with the concurrence of the company.

"ORDINANCE No. 52.

"An ordinance granting the right of way to the St. Paul & Chicago Railway Company through the city of Red Wing.

*"The City Council of the City of Red Wing do ordain.*

"Section 1. The St. Paul & Chicago Railway Company is hereby authorized and empowered to locate and construct its railroad into and through the city of Red Wing, with such number of tracks, switches, turnouts, and side tracks as may be necessary for the business of said company over, upon, and across such streets as the line of said railroad as now located crosses; and also over, along, and upon the steam-boat landing or public levee in front of blocks 41, 42, and 43, in Red Wing proper, and to operate and use such tracks, with locomotives and cars, *except* and *provided* that only the tracks of said railroad now constructed shall be located or constructed at any place within said city east of Bush street.

"Sec. 2. The said franchise and right of way are granted to and accepted by the said St. Paul & Chicago Railway Company upon the express conditions following; that is to say:

"*First.* That as a condition precedent to the right to construct and maintain said tracks, turnouts, and switches over and upon said streets and public levee, said company shall grade the said levee between the wharves as now constructed in front of said blocks 41 and 42 in such a manner as not to prevent or obstruct access to and the free use of such levee as a steam-boat landing, and for the purposes of the business connected therewith.

"*Second.* The said company shall fill up and keep and maintain the said levee between the main track of said railroad and the northerly line of said blocks 41 and 42 in such a manner so that the said levee shall be as near level with the top of the rails of said track as practicable, and afford suitable drainage towards Potter street.

"*Third.* The said company shall construct and maintain all gutters and water-courses necessary to conduct and carry off the water from said levee in such manner as to prevent all surface water from injuring said levee.

"*Fourth.* The said company shall plank the space between and immediately outside of the rails of said railway in all places on all of its tracks laid across or upon said levee, or in front of said blocks 41, 42, and 43, which planking the said company shall at all times keep in a good and proper state of repair.

"*Fifth.* The said company shall at all places in front of said blocks 41 and 42 lay the rails of said tracks in such manner so that the top of said rails shall be and remain at least eight inches below the level of the door-sill of the storm warehouse now owned by James Lawther and situated upon lot 9 in said block 42.

"*Sixth.* The said company shall so locate and construct its tracks, switches, and improvements as to afford convenient and easy crossings and carriage ways over the same at all street and alley crossings within said city, with an easy grade suitable for the safe and ready passage of vehicles of all kinds; all such crossings to be planked inside and outside of the tracks to the top of the rail, and which crossings shall at all times be by said company kept in a good and proper state of repair; said crossings at Plum and Bush streets to be so planked to the width of not less than 30 feet, and the one at Broad street to the width of not less than 60 feet; and said company shall within 20 days after notice cause Levee street, between Plum and Broad streets, to be made and put in as good condition, and in all respects as accessible for public use, as the same was before said company commenced the construction of its road between the streets last aforesaid; all to be done under the direction of said city council and to its acceptance.

"*Seventh.* If at any time hereafter said city shall cause to be laid out or opened any streets or alleys, crossing any of said tracks, the said company shall, within five days after notice from said city council so to do, make and plank the crossings of such streets and alleys in manner as provided in said sixth condition thereof; and if at any time hereafter said council shall deem it necessary that any crossings should be filled or planked to a width greater than that originally designated, said company shall, within five days after notice so to do, fill and plank such crossings to such increased width as may be designated by said council.

"*Eighth.* The said company shall make in a good and sufficient manner all water-courses, ditches, and drains necessary to carry off all water, so that there shall not at any time, within said city, be any stagnant water caused by reason of any work done or to be done, by said company.

"*Ninth.* If at any time hereafter said city shall cause Levee street to be graded, the said company shall, within 20 days after notice so to do, fill up the intervening space which may be upon the land of company in block 52, in Red Wing proper, and the northerly line of said street, level with the grade of said street, as it is or may be established by said city; and in like manner fill the crossings at Bush and Plum streets.

"*Tenth.* The said company shall keep the streets and said levee as free as possible from freights, trains, locomotive engines, and cars, and shall not permit any locomotive, car or cars, or train of cars, to stop or remain upon any street crossing for a longer period than five minutes at any one time; and said company shall not obstruct or unnecessarily interfere with the convenient operation of steam-boats or passenger or freight traffic on said public levee; and shall not permit any car or cars to stand or be upon said levee except while the same are being actually loaded at or from some warehouse thereon.

"*Eleventh.* The said company shall not permit any locomotive engine, railroad passenger car, or freight car to be driven, propelled, or run upon or along

the track of said company at a greater rate of speed than four miles per hour at any point within said city between the westerly end of Barn bluff and the westerly side of Jackson street; and at each of said places said company shall erect and maintain a sign-board having thereon the words 'Stop speed; ring the bell;' and while in motion between said points the bell of such locomotive shall be continually sounded to warn persons of approaching danger.

*"Twelfth.* The said company shall, at each and every street crossing within said city, erect and maintain a sign-board having distinctly painted thereon the words 'Railroad crossing.'

*"Thirteenth.* The said company shall not change the grade of its railroad, at any point within said city without the consent of said city council.

*"Fourteenth.* All acts or work or labor done or to be done or performed by said company under the provisions hereof shall be done in such manner as directed by and to the satisfaction and acceptance of said city council.

*"Fifteenth.* The service upon the person in charge of the station-house of said company, situate within said city, of any notice herein provided, shall be in all respects deemed and held a good and sufficient service upon said company. The officer, servants, agents, and employes of said company shall be subject to all police regulations under this ordinance, and under any other law or ordinance of said city.

*"Sixteenth.* The said company expressly assumes the responsibility of all damages to life, limb, or property resulting from any failure or neglect to comply with any of the provisions of this ordinance, or any by-law or resolution passed thereunder, or any other by-law, resolution, or ordinance now or hereafter in force within said city.

*"Seventeenth.* This ordinance may at any time hereafter be changed, amended, or modified by said city, or the proper authorities thereof.

✓ "Passed July 12, 1870."

The present complainant is the owner of several city blocks adjoining the river, and abutting on the south a street designated on the city plat as Levee street, one of the streets specified in the ordinance through which the company was authorized to build its tracks, and since 1870, either by the St. Paul & Chicago Railway Company or the complainant, several tracks have been laid, most of them on the company's land, but crossing all the streets intersecting Levee street at right angles between Hill and Bush streets. There are no tracks running longitudinally on this Levee street, but a spur track has been built from the company's land over a part of the street to reach certain flouring mills and warehouses built on the lots fronting the southerly portion. On November 4, 1882, the complainant commenced to build a track lengthwise of Levee street on that part fronting and abutting its lots near Dakota to Hill street, which track would con-

nect the yard and depot with turn-table and round-house, and on November 14th had expended, as appears by the bill of complaint, about \$1,500, and was continuing its construction. On that day the common council passed the following ordinance:

"An ordinance to amend an ordinance of the city of Red Wing, Minnesota, passed July 12, 1871, entitled 'An ordinance granting the right of way to the St. Paul & Chicago Railway Company through the city of Red Wing.'

*"The City Council at the City of Red Wing do ordain:*

"Section 1. That an ordinance of said city, passed July 12, 1871, entitled 'An ordinance granting the right of way to the St. Paul & Chicago Railway Company through the city of Red Wing,' be and the same is hereby amended by adding thereto the following new section, to be numbered and known as section 3; that is to say:

"Sec. 3. It shall not be lawful for the St. Paul & Chicago Railway Company, or its successors or assigns, nor for the Chicago, Milwaukee & St. Paul Railway Company, to enter upon or grade or lay any ties, rails, or railroad track, or any switch or turnout, or any other matter or thing, in or upon, or in any manner to use or occupy any part of, the steam-boat landing or public levee in front of any of the blocks numbered, respectively, 41, 42, and 43 in Red Wing proper, or any part of Levee street within the limits of said city, without first having obtained from the city council of said city a license authorizing such entry, and the laying of such additional railroad track: provided, that nothing in this section contained shall be so construed as to prevent the use of said railway companies, or either of them, of any railroad track fully laid and in use by said companies, or either of them, prior to the fourteenth day of November, 1882, and which track has been so laid and operated by authority of said city council."

—And notified the company to desist from the work contemplated. On the same day or evening previous an ordinance was passed granting the right of way over Levee street to the Minnesota Central Railroad Company.

The complainant owned the fee of Levee street to the center abutting its property, and, without first obtaining authority by condemnation or otherwise for the additional burden to be imposed thereon, the Minnesota Central Railroad Company proceeded to construct its track over and along this Levee street, in front of complainant's lots and blocks. A bill is filed by the Chicago, Milwaukee & St. Paul Railway Company against the city of Red Wing and the Minnesota Central Railroad Company, and an injunction is prayed against the city to prevent interference with the construction of the track surveyed along Levee street, and against the Minnesota Central Railroad Company.

*H. R. Bigelow*, for complainant.

*Gordon E. Cole*, for Minnesota Central Railroad Company.

*W. C. Williston*, for city of Red Wing.

NELSON, D. J. It appeared on the argument, from an affidavit of the president or active manager in construction of the Minnesota Central Railroad, that, without the knowledge and direction of him or any officer having authority, a track was being laid by its employes under the ordinance granted, as set forth in the bill of complaint, but it is also stated that when he was informed of it direction was given to desist, which they did, and that this company has no intention to further proceed, unless, by proper condemnation proceedings, the right so to do is legally obtained. Upon such disclaimer I shall not issue a preliminary injunction at this time against the railroad company, but give leave to the complainant to apply for an injunction at a future time in case an attempt is made to construct its track upon that part of the street over which the complainant has the fee.

In respect to the city: The company having voluntarily submitted to construct its road through the city of Red Wing under the ordinance reserving the right to alter and amend, must submit to such alterations and amendments as are reasonable and necessary. The ordinance did not, however, give authority to amend or repeal so as to affect essential and vested rights. The common council of the city reserved the right to alter and amend this ordinance of 1870 within the scope of the legislative power conferred on the municipality, but no more than reasonable alterations could be passed, such as would be necessary to carry into effect the original purposes of the ordinance and properly preserve the rights of the public. No exclusive right of way over that or any other street was given to the complainant or its predecessor. It could grant authority to another corporation to run its track over the street, and thus confer, so far as it was possible for the city to do, a right to use the street, but in so doing the city could not interfere with the rights acquired by the complainant. Has it done so by the subsequent amendment to the ordinance of 1871, by its action November 14, 1882?

It was stated on the argument, by the counsel for the city, that in this controversy the city really had no interest, and that it was one between the two railroad companies. If such is the understanding of the common council, then it was not the purpose of the city, by the last ordinance, to interfere with any rights of property in and to the street which the complainant had acquired. Certainly this amendment could not act retrospectively and take away rights of property

which had been previously granted. At the utmost, the ordinance can only compel the complainant to obtain the consent of the city before more tracks could be laid down by it upon Levee street. It is urged that the ordinance prevented the complainant from completing the work already commenced on November 4, 1882, and it appears such was the view entertained by the city authorities when notice was served on the complainant to stop work. I cannot assent to such construction of the ordinance. The right of way given was a private grant on the part of the city, and the complainant, having the authority, proceeded to construct its track and exercise the right granted. It was clearly necessary, as disclosed, not only by the bill, but by the affidavits of the citizens of Red Wing, read on the part of the defendants. The number of cars required to furnish transportation, and the large mills and warehouses on Levee street furnishing freight, and the great growth of the city and the surrounding country, required not only greater facilities than the complainant supplied, but had induced the construction of the Minnesota Central Railroad, making the city of Red Wing a terminus. The ordinance of 1871 contemplated such increase of traffic, and authorized the building of all necessary tracks to meet the requirements of trade and the wants of the public, but no exclusive right of way was given. The company, in good faith, for aught that appears, was exercising legally the right given by the city ordinance, and had expended quite an amount of money in construction when stopped. I think the arrangement entered into between the city and the complainant's predecessor, by which its route was changed and the ordinance of 1871 was passed, was more than a mere license which could be revoked at a future time. It has all the elements of a contract, in view of the fact that the charter gave legislative authority to use the public streets in constructing the road from Winona to St. Paul.

It was urged upon the hearing that the complainant had violated a condition (No. 10) upon which the right of way was granted, and the common council could repeal, and thus divest the property rights acquired thereunder. At the most, this provision (No. 10) is a condition subsequent, and courts of equity do not look with favor upon such conditions, and certainly will not enforce them, unless the contract clearly compels it. I am inclined, however, to think the provision No. 10 in this ordinance is in its nature a mere covenant, and a breach would not authorize the common council to divest the estate.

In view of what has been stated, I think the complainant can complete the track it was building when work stopped, notwithstanding the ordinance of November 14, 1882; but as the counsel for the city states the controversy is one between the defendant railroad and the complainant, and the city really has no interest at stake, I shall not issue an injunction unless there is future interference with the contemplated work.

In the view taken it is not necessary to consider the effect of a suit commenced in the state court by the city of Red Wing against the Chicago, Milwaukee & St. Paul Railway Company, and removed to this court, where it is now pending.

Motion for injunction denied, with leave to renew.

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**MEMPHIS & LITTLE ROCK R. Co. v. NOLAN, Comptroller, etc., and another, County Clerk, etc.**

(Circuit Court, W. D. Tennessee. September 9, 1882.)

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE—TAXATION—EXPRESS COMPANIES.**

A license or privilege tax imposed by a state on the business of an express company engaged solely in commerce between the states, where there is no intention by this means to obstruct or prohibit the business, is not unconstitutional.

In Equity.

*B. C. Brown and Weatherford & Estes*, for plaintiff.

*G. P. M. Turner*, Atty. Gen., for defendants.

HAMMOND, D. J. This is an application for a preliminary injunction to restrain the defendants, who are tax-collecting officers of the state and county, respectively, from collecting the privilege tax imposed by law on the defendants for doing business as an express company in the state of Tennessee. The plaintiff denied that it was an express company, claiming that its express freight department was only a part of its general freight-carrying business, so conducted for its own and the convenience of the public. On an agreed statement of facts, the state courts, by a final judgment of the supreme court, decided that the two classes of business were distinct, and that the defendant was liable for this license or privilege tax. *Memphis & L. R. R. Co. v. State*, MSS. (Jackson, April, 1882.)



The bill here claims relief on the ground that the defendant "is solely engaged in interstate commerce; that the tax, hereinafter mentioned, sought to be imposed upon it by the state of Tennessee, under the pretense that orator is an express company, is a tax upon interstate commerce, and as such is forbidden by the constitution of the United States, and is illegal and void." The facts alleged are that this railroad company has its terminus only in this state, crossing the river here by transfer boat, using the streets of Memphis by special license, and that every parcel of freight is carried or brought between the different states, and that none of its business is done solely within this state.

Passing all other questions like that of our jurisdiction, of which, perhaps, there is now no reasonable doubt, and that of the estoppel claimed by the litigation in the supreme court, as a matter *res judicata*, I am of opinion that the application must be denied on the merits. I should feel, on the cases cited by the learned counsel for the plaintiff, great difficulty in determining this question, for there is much force in the argument that this privilege tax is only an indirect mode for taxing the commerce itself. The supreme court has repeatedly said, what Mr. Justice Bradley says in *Railroad Co. v. Maryland*, 21 Wall. 456, 472, that "it is often difficult to draw the line between the power of the state and the prohibition of the constitution." The distinctions made by the cases seem somewhat arbitrary; but this is possibly unavoidable, owing to the nature of the subject. As I read the cases, the principle is that so long as it is not a direct tax on the property carried in the commerce between the states, imposed either on the goods or indirectly collected from them, and is only a tax on the franchises granted to the carrier in consideration of the grant, or, what is the same thing, a tax or tribute demanded for the privilege of doing the business, the prohibition of the constitution does not apply. Of course, in analogy to our state adjudications, if, under the disguise of taxing a franchise or privilege, the state should undertake, by excessive taxation, to obstruct or prohibit the business of interstate commerce, the constitutional provision would protect against it. There is no claim of that in this case; and no intention to either obstruct or prohibit this defendant from doing this business can be inferred from these statutes. Fortunately for us, here the supreme court itself has drawn the line, and this case finds a direct precedent in the case of *Osborne v. Mobile*, 16 Wall. 479, where the right of the state of Alabama to authorize the city of

Mobile to impose a license or privilege tax on an express company engaged in interstate commerce was sustained.

The injunction is refused.

See *Ex parte Thornton*, 12 FED. REP. 551, note. See, as to restraining collection of tax, *Second Nat. Bank v. Caldwell*, 13 FED. REP. 434, note.

**INTERSTATE COMMERCE.** Article 1, § 8, subd. 3, of the federal constitution vests congress with the power to regulate interstate commerce, every part of which is indicated by the term. (a) The term "commerce" refers to trade, (b) or traffic and exchange of commodities. (c) Commerce is intercourse, (d) and is not limited to the mere buying and selling, but comprehends active commercial intercourse, (e) for the purposes of trade, whether by land or water, (f) or communication by telegraph, (g) and includes the buying and selling of exchange. (h)

Transportation is essential to commerce, as the transportation of articles from one state to another (i) for gain or for purchase, or exchange of commodities, (j) or passengers (k) on railroads through the several states, or between the states; (l) so a tax on freight taken out of or brought into a state is invalid; (m) and a state law laying a distinct tax on a foreign corporation for transportation of goods in trains from state to state, is unconstitutional. (n) Commerce includes navigation as well as traffic, (o) and obstacles or burdens laid on it are regulations of commerce, (p) and state statutes imposing the same on interstate commerce are in conflict with the federal constitution. (q)

**DOMESTIC COMMERCE.** The power conferred on congress by the commercial clause of the constitution is exclusive, so far as relates to matters within

(a) *Gibbons v. Ogden*, 9 Wheat. 1; *Lin Sing v. Washburn*, 20 Cal. 534.

(b) *U. S. v. Bailey*, 1 McLean, 234.

(c) *The Daniel Ball*, 10 Wall. 557; *Mobile Co. v. Kimball*, 102 U. S. 691.

(d) *McCulloch v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1; *Groves v. Slaughter*, 15 Pet. 449; *U. S. v. Holliday*, 3 Wall. 417; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Mitchell v. Steelman*, 8 Cal. 363; *Steam-boat Co. v. Livingston*, 3 Cow. 713; *Moor v. Venzie*, 32 Me. 343; *Mobile Co. v. Kimball*, 102 U. S. 691.

(e) *People v. Brooks*, 4 Denio, 469; *State v. Delaware*, etc., R. Co. 30 N. J. Law, 473.

(f) *State Freight Tax Cases*, 15 Wall. 275; *Clinton Bridge Case*, 10 Wall. 454.

(g) *Western Union Tel. Co. v. Atlantic & P. Tel. Co.* 5 Nev. 102; *Pensacola Tel. Co. v. Western U. Tel. Co.* 2 Woods, 643; *Telegraph Co. v. W. U. Tel. Co.* 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460. As to government messages, a tax by the state is on the means employed by the government to execute its constitutional powers, and is void. *McCulloch v. Maryland*, 4 Wheat. 316; *Telegraph Co. v. Texas*, 105 U. S. 466.

(h) *U. S. v. Holliday*, 3 Wall. 417.

(i) *State Freight Tax Cases*, 15 Wall. 275;

*Ward v. Maryland*, 12 Wall. 418; *Welton v. State*, 91 U. S. 275; *Henderson v. Mayor*, etc., 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 473.

(j) *State Freight Tax Cases*, 15 Wall. 275; *Welton v. State*, 91 U. S. 275; *Passenger Cases*, 7 How. 282.

(k) *People v. Raymond*, 34 Cal. 492.

(l) *Pick v. Chicago*, etc., R. Co. 6 Biss. 182

(m) *State Freight Tax Cases*, 15 Wall. 232.

(n) *Erle R. Co. v. New Jersey*, 2 Vroom, 531.

(o) *McCulloch v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1; 17 Johns. Ch. 488; 4 Johns. Ch. 150, 175; *U. S. v. Coombs*, 12 Pet. 72; *Cooley v. Port-wardens*, 12 How. 319; *N. R. Steam-boat Co. v. Livingston*, 3 Cow. 713; *Passenger Cases*, 7 How. 282; 45 Mass. 282; *The Wilson v. U. S.* 1 Brock. 423; *People v. Brooks*, 4 Denio, 469; *Chapman v. Miller*, 2 Spears, 769; *South Carolina v. Georgia*, 93 U. S. 4; *Clinton Bridge Case*, 10 Wall. 454.

(p) *State Freight Tax Cases*, 15 Wall. 232; *Ward v. Maryland*, 12 Wall. 418; *Welton v. State*, 91 U. S. 275; *Chy Lung v. Freeman*, 92 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 470.

(q) *Hall v. De Cuir*, 95 U. S. 488; *Welton v. State*, 91 Mo. 282; *Council Bluffs v. Kansas*, etc., R. Co. 45.

its purview, of a national character, and which admits or requires uniform regulation affecting all the states;(r) but the commercial clause of the constitution is not operative on persons and things within the boundaries of the state jurisdiction,(s) and it neither regulates nor prohibits taxation;(t) so taxation by a state on business done within its boundaries is valid.(u) The constitutionality or unconstitutionality of a state tax is to be determined by the subject upon which the burden falls, and not by the form or agency through which it is collected. The effect and not the purpose of the law is to be considered. It is not cured by including subjects within the domain of the state.(v)

A state may regulate its own internal commerce,(w) when it does not interfere with the free navigation of the waters of the state for purposes of interstate commerce.(x) Not everything which affects commerce amounts to a regulation of it.(y)

**STATE AUTHORITY TO TAX.** Where the tax imposed is only a tax on the privilege of doing business within the state, it is not in violation of the constitution:(a) so the tax on a franchise is lawful,(b) and a state may authorize a city to impose a license or privilege tax on an express company engaged in interstate commerce.(c) The states have power to tax, notwithstanding the tax may have some indirect bearing on foreign commerce.(d) So a state may require a portion of the earnings of a railroad to be paid to the state,(e) and a tax on the gross receipts of a transportation company is a tax on the fruits of transportation and is valid.(f) It is not a tax on commerce,(g) and so of the gross receipts of warehousemen derived from the exercise of the special privilege.(h) or of a railroad.(i) Telegraph lines are considered as partaking of the nature of realty, in analogy to the new doctrine that railroads and rolling stock are so treated and consequently such property is liable to state and county taxes, notwithstanding they also pay a privilege tax.(j) Though telegraph com-

(r) *Mobile Co. v. Kimball*, 102 U. S. 691. See *Webber v. Virginia*, 103 U. S. 344.

(s) *King v. Amer. Trans. Co.* 1 Flippin, 1.

(t) *Gibbons v. Ogden*, 9 Wheat. 1.

(u) *Cleveland, etc., R. Co. v. Pennsylvania*, 15 Wall. 300.

(v) *Reading R. Co. v. Pennsylvania*, 15 Wall. 232; *Brown v. Maryland*, 12 Wheat. 418; *Hays v. S. S. Co.* 17 How. 596; *S. S. Co. v. Port-wardens*, 6 Wall. 31; *Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 36; *Almy v. California*, 24 How. 169; *Tonnage Tax Cases*, 15 Wall. 272; *State Tax on Foreign Bonds*, Id. 300; *Munn v. Illinois*, 94 U. S. 131.

(w) *Wilson v. Kansas, etc.*, R. Co. 60 Mo. 184; *Wheeling Bridge Case*, 18 How. 432; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 Wall. 411; *Peck v. Chicago, etc.*, R. Co. 94 U. S. 164; *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1; *New Bedford Bridge Case*, 1 Wood. & M. 410; *People v. Platt*, 17 Johns. 195; *Scott v. Wilson*, 3 N. H. 321; *Canal Com'rs v. People*, 5 Wend. 448; *People v. Rensselaer, etc.*, R. Co. 15 Wend. 113; *Mobile Co. Co. v. Kimball*, 12 U. S. 691.

(x) *Coryfield v. Coryell*, 4 Wash. C. C. 371.

(y) *Delaware Railroad Tax*, 18 Wall. 232; *South Carolina v. Charleston*, 4 Rich. 289; *State Tax on Railroad Gross Receipts*, 15 Wall. 231; *Reading R. Co. v. Pennsylvania*, 15 Wall. 234.

(a) *Railroad Co. v. Maryland*, 21 Wall. 456.

(b) *State Freight Tax Cases*, 15 Wall. 277; *State Tax on Gros. Receipts*, 15 Wall. 231; *Society for Sav. v. Corte*, 6 Wall. 606; *Osborn v. U. S. Bank*, 9 Wheat. 559; *Brown v. Maryland*, 12 Wheat. 444; *Erie Railway v. Pennsylvania*, 21 Wall. 497.

(c) *Osborne v. Mobile*, 16 Wall. 479.

(d) *Nathan v. Louisiana*, 8 How. 73; *Packet Co. v. Catlettsburg*, 105 U. S. 559.

(e) *Railroad Co. v. Maryland*, 21 Wall. 456.

(f) *Reading R. Co. v. Connecticut*, 15 Wall. 234; *Woodruff v. Parham*, 8 Wall. 123; *State Tax on Gross Railway Receipts*, 15 Wall. 232. See *Minot v. Philadelphia, etc.*, R. Co. 18 Wall. 206; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

(g) *Southern Express Co. v. Hood*, 15 Rich. 66; *Western Union Tel. Co. v. Mayer*, 23 Ohio St. 521. See *Dubuque v. C., etc.*, R. Co. 47 Iowa, 196.

(h) *State v. Baltimore & Ohio R. Co.* 48 Md. 50.

(i) *Reading R. Co. v. Pennsylvania*, 15 Wall. 232.

(j) *Western Union Tel. Co. v. State*, 9 Bax. 503.

panies may be subject to congressional regulations, they are also subject to occupation taxes, at least till congress otherwise provides; (k) but a tax on telegraph messages to points without the state is unconstitutional. (l) Laws imposing half pilotage fees are not regulations of commerce; but a law which requires every vessel to pay a specific sum to the port-wardens, whether called on to perform any service or not, is a regulation of commerce. (u) A city may be empowered to lay a tax on steam-boats having that city as their home port according to their value; (o) but an act requiring owners of steam-boats to file a statement in writing, setting forth the name of the vessel and of the owner or owners, and their residence and interest, was held void as to steam-boats which had taken out a coasting license. (p)

**TAX ON EXPORTS.** A tax on freight taken out of or brought into a state is invalid. (q) So a tax on ores exported before smelting, and exempting all ores smelted in the state, is a regulation of commerce and void. (r) So the produce of one state lying in the port of another state, awaiting shipment, is not subject to taxation in the latter state. (s) Property belonging to a citizen of another state, in its transit to market to such state, and not offered for sale during transit, is not subject to taxation. (t) So, where a person purchased corn from various parties, caused it to be removed to the railway, and there to be put in cribs temporarily to await transportation, and with the purpose to have it carried beyond the state, *held*, that it was in commercial transit and not taxable by the state. (u) But there must be a purpose to ship immediately, or as soon as transportation can be conveniently obtained, followed up by actual shipment in a reasonable time. (v) An act imposing a stamp duty on bills of lading for goods transported from the state is void. (w)

**TAX ON IMPORTS.** Goods imported, in the hands of the importer, are not a mass of the property of the state, (x) but after they have been broken up for use or for retail, and been incorporated or mixed up with the property of the state, a tax may be imposed on them; (y) but if a state singles out imports as a spe-

(k) *Western Union Tel. Co. v. State*, 55 Tex. 314; *Telegraph Co. v. Texas*, 105 U. S. 460; *Telegraph Co. v. W. U. Tel. Co.* 96 U. S. 1; *Packet Co. v. Catlettsburg*, 105 U. S. 559.

(l) *Western Union Tel. Co. v. Texas*, 14 Cent. L. J. 448.

(n) *Steam-ship Co. v. Port-wardens*, 6 Wall. 31.

(o) *Wheeling, etc., Transp. Co. v. Wheeling*, 9 W. Va. 170.

(p) *Sinnot v. Davenport*, 22 How. 227.

(q) *State Freight Tax Cases*, 15 Wall. 232.

(r) *Jackson Min. Co. v. Auditor General*, 32 Mich. 498.

(s) *State v. Eagle*, 34 N. J. L. 425; *State v. Cumberland R. Co.* 4 Md. 22. Are the statutes of a state in violation of the constitution if they subject to taxation the capital of her citizens, although on the day to which the assessment of it relates it is invested in products on shipboard in the course of exportation to foreign countries or in transit from one state to another for purposes of exportation—*quære*. *People v. Commissioners*, 104 U. S. 466.

(t) *State v. Eagle*, 31 N. J. L. 427

(u) *Ogilvie v. Crawford Co.* 2 McCrary, 143.

(v) *Id.* Timber, at a port in a state awaiting shipment, belonging to and in the hands of a foreign subject, and under contract of sale to parties abroad, while thus segregated from the mass of the property of the state is not subject to taxation. *Blount v. Monroe*, 60 Ga. 61.

(w) *Almy v. State*, 24 How. 163; *Woodruff v. Parham*, 3 Wall. 173; 15 Wall. 280.

(x) *Almy v. State*, 24 How. 169; *Woodruff v. Parham*, 3 Wall. 123; *Hinson v. Latt*, *id.* 143; *Low v. Austin*, 13 Wall. 31. See *Guy v. Baltimore*, 100 U. S. 434.

(y) *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 575; *Pervaur v. Com.* 5 Wall. 479; *Waring v. Mayor*, 8 Wall. 122; *State Tax on R. Gross Receipts*, 15 Wall. 295; *People v. Coleman*, 4 Cal. 46; *Wynne v. Wright*, 4 Dev. & B. 19; *Cowles v. Brittain*, 2 Hawks, 204; *Tracy v. State*, 3 Mo. 3; *Murray v. Charleston*, 96 U. S. 447; *Davis v. Dashiell*, Phil. N. C. 114; *Cummings v. Savannah*, R. M. Charit. 26; *Biddle v. Commonwealth*, 13 Serg. & R. 405; *Murray v. Charleston*, 96 U. S. 447. And see *Raguet v. Wade*, 4 Ohio, 107.

cial object for any impost or duty, it is unlawful; (z) the articles cease to be importations the moment the importer becomes a vendor, (a) and a tax on gross sales is not unconstitutional. (b)

**DISCRIMINATION.** Any discrimination against the products of another state is in conflict with the commercial clause of the constitution. (c) So a tax law which discriminates in favor of goods manufactured within the state, and against goods manufactured without the state, is unconstitutional and void. (d) A state cannot discriminate against a citizen by reason of his buying or selling such products. (e) So far as necessary to protect the products of other states from discrimination, the power of the national government over commerce reaches the interior of every state. (f) Where a statute discriminated against liquors manufactured out of the state, injunction against collection of the tax refused, as the vendor was selling other liquors. (g) Such an act is inoperative only so far as it discriminates. (h) Imposing a license fee upon non-resident salesmen traveling in and selling goods in the state, is in conflict with the constitution of the United States. (i) The prohibition is general, and reaches a tax on the sale of the article imported, and on the occupation of the importer. (j)

**PASSENGER TAXES.** The power of congress to regulate commerce extends to persons as well as property; (k) but it confers no power to regulate the *status* of persons—the power ceases when they arrive. (l) A state cannot impose on ship-masters burdensome conditions to the landing of passengers; (m) nor can it enforce laws regulating their arrival from a foreign port. (n) So the imposition of a tax on passengers arriving from a foreign port is unconstitutional and void. (o) So a tax on passengers or goods passing through a state is invalid; (p) or a tax on passengers leaving a state (q) or traveling from state to state is void. (r) An act imposing a tax of one dollar on every passenger leaving the state by railroad or stage-coach or other vehicle is void as a regulation of commerce, (s) as interstate transportation of passengers is beyond the reach of a state legislature; (t) and so of an act discriminating against Chinese

(z) *People v. Moring*, 47 Barb. 642; *Brown v. Maryland*, 12 Wheat. 419; and see *Welton v. Missouri*, 91 U. S. 275; *Cook v. Pennsylvania*, 97 U. S. 566; *Webber v. Virginia*, 103 U. S. 344.

(a) *State v. Peckham*, 3 R. I. 289. See *Davis v. Dashiell*, Phil. N. C. 114; *Waring v. The Mayor*, 8 Wall. 110.

(b) *Waring v. The Mayor*, 9 Wall. 110; *State v. Pinckney*, 18 Rich. 474; *Osborne v. Mobile*, 16 Wall. 481.

(c) *Webber v. Virginia*, 103 U. S. 344; *Welton v. Missouri*, 91 U. S. 275; *Mobile Co. v. Kimball*, 102 U. S. 691.

(d) *State v. Furbush*, 72 Me. 493; *Tiernan v. Rinker*, 102 U. S. 123.

(e) *Guy v. Baltimore*, 100 U. S. 434.

(f) *Guy v. Baltimore*, 100 U. S. 434; *Brown v. Maryland*, 12 Wheat. 119. See 12 Fed. Rep. 551, note.

(g) *Tiernan v. Rinker*, 102 U. S. 123.

(h) *Id.*

(i) *Van Buren v. Downing*, 41 Wis. 122; *Ward v. Maryland*, 12 Wall. 415.

(j) *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 504; *State v. North*, 27 Mo. 464; *Biddle v. Com.* 13 Serg. & R. 405.

(k) *Lin Sing v. Washburn*, 20 Cal. 534.

(l) *Sinnot v. Davenport*, 22 How. 227; *Blanchard v. The Martha Washington*, 1 Chff. 473; *Ex parte Ah Fong*, 3 Sawy. 145.

(m) *Henderson v. Mayor of N. Y.* 92 U. S. 259.

(n) *Chy Lung v. Freeman*, 92 U. S. 275.

(o) *Passenger Cases*, 7 How. 349; *People v. Raymond*, 34 Cal. 492; *State v. The Steam-ship Constitution*, 42 Cal. 589.

(p) *Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35.

(q) *Crandall v. Nevada*, 6 Wall. 48; *Clarke v. Phila., W. & B. R. Co.* 4 Houst. 153.

(r) *Steam-ship Co. v. Port-warden*, 6 Wall. 35.

(s) *Crandall v. Nevada*, 6 Wall. 37; *Clarke v. Philadelphia*, 4 Houst. 153.

(t) *State v. Freight Tax Case*, 15 Wall. 281.

immigration.(u) The object of the prohibition in the federal constitution is to protect both vessel and cargo from state taxation while *in transitu*, and this prohibition cannot be evaded and the same result effected by calling it a tax on passengers or on the master.(v) A statute declaring the running of sleeping-cars to be a privilege, and imposing a tax thereon, held constitutional, notwithstanding they are used for the accommodation of passengers traveling through the state.(w)

**TONNAGE DUTY.** A tax levied on a vessel irrespective of her value as property, and solely on the basis of her tonnage, is a duty on tonnage,(a) and is prohibited by the federal constitution.(b) A charge for services rendered or conveniences provided, is in no sense a tax or duty.(c) So a statute allowing fees to harbor masters for assigning vessels to their berths is not a tonnage duty, although ascertained by the tonnage of the vessels.(d) So wharfage charges are not a duty on tonnage,(e) whether the wharf be built by the state, a municipal corporation, or a private individual.(f) But a tax on tonnage cannot be imposed, ostensibly passed to collect wharfage;(g) so a tax imposed on all vessels arriving and departing, and not merely for the use of the wharf, is inhibited.(h) A city may exact and receive a reasonable compensation for the use of artificial improvements;(i) but a state statute which imposes a tax upon every ton of freight carried by every railroad, steam-boat, and canal company doing business within the state, so far as it relates to articles carried through the state, or articles taken up in the state and carried into another state, or articles taken up outside the state and brought into it, is unconstitutional and void.(j)

**TRANSPORTATION OF GOODS.** An act which affects the carriage of goods from state to state is unconstitutional and void.(k) Transportation companies doing business within the state may be required to pay a tax, but it cannot be enforced upon merchandise in a course of transportation from state to state;(l) and a tax on lawful and ordinary means of transportation is a tax on the thing carried, and is not a mere police regulation, and is uncon-

(u) *Lin Sing v. Washburn*, 20 Cal. 534. But see *State v. Baltimore & O. R. Co.* 34 Md. 344; *Railroad Co. v. Maryland*, 21 Wall. 456.

(v) *Passenger Cases*, 7 How. 293; *People v. Downer*, 7 Cal. 169; *Crandall v. Nevada*, 6 Wall. 35.

(w) *Pullman S. C. Co. v. Garnes*, 3 Tenn. Ch. 587.

(a) *State Tonnage Tax Cases*, 12 Wall. 204.

(b) *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 293; *Steam-ship Co. v. Port Wardens*, 6 Wall. 31; *State Tonnage Tax Cases*, 12 Wall. 204; *Cannon v. New Orleans*, 20 Wall. 577.

(c) *Keokuk N. P. Co. v. Keokuk*, 10 Chl. Leg. News, 91. As for harbors, pilotage, beacon lights, bboys, and the improvement of harbors, bays, and navigable rivers within the state in the absence of congressional legislation: *Mobile Co. v. Kimball*, 102 U. S. 691. So as to laws imposing pilotage fees: *Steam-ship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236; *Cooley v. Port Wardens*, 12 How. 299.

(d) *State v. Charleston*, 4 Rich. 286; *Benedict v. Vanderbilt*, 1 Robt. 194; *The Martha J. Ward*, 14 La. Ann. 289.

(e) *Cooley v. Port Wardens*, 12 How. 299; *Wharf Case*, 8 Bland. 361; *Keokuk v. K. & C. Co.* 45 Iowa, 186; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Sterrett v. Houston*, 14 Tex. 166; *Municipality v. Pease*, 2 La. Ann. 538; *The Ann Ryan*, 7 Ben. 20; *Guy v. Baltimore*, 100 U. S. 434.

(f) *Packet Co. v. Keokuk*, 95 U. S. 84; *Cannon v. New Orleans*, 20 Wall. 577.

(g) *State Tonnage Tax Case*, 12 Wheat. 219; *Alexander v. Railroad Co.* 3 Strob. 594; *Packet Co. v. Keokuk*, 95 U. S. 84.

(h) *Northwestern N. P. Co. v. St. Paul*, 3 Dill. 454.

(i) *Worsley v. Municipality*, 9 Rob. (La.) 324; *Packet Co. v. Keokuk*, 95 U. S. 84.

(j) *State Freight Tax*, 15 Wall. 232; *Erie Ry. Co. v. Pennsylvania*, Id. 282.

(k) *State Freight Tax Cases*, 15 Wall. 232.

(l) *Reading R. Co. v. Pennsylvania*, 15 Wall. 232.

stitutional.(m) By no device or evasion, by no form of statutory words, can a state compel citizens of other states to pay a tax, contribution, or toll for the privilege of having their goods transported through the state by the ordinary channel of commerce.(n) That which cannot be done directly cannot be done indirectly.(o) So a state cannot levy a duty or tax upon the master or owner of a vessel engaged in commerce, graduated on the tonnage or admeasurements of the vessel; she cannot effect the same purpose by merely changing the ratio and graduating it on the number of masts or marines, the size and power of the steam-engine, or the number of passengers which she carries.(p)[—ED.

(m) *Minot v. Phila., etc.*, R. Co. 2 Abb. (U. S.) 323; S. C. 7 Phila. 555; *Cook v. Com.* 6 Amer. Law Reg. 375.

(n) *State Tax on Gross Railway Receipts*, 15 Wall. 284.

(o) *Wayman v. Southard*, 10 Wheat. 1; *Passenger Cases*, 7 How. 283; *Brown v. Maryland*, 12 Wheat. 417; *Missouri v. North*, 27 Mo. 479.

(p) *Passenger Cases*, 7 How. 283.

## FORTY-THREE CASES COGNAC BRANDY, etc.

(Circuit Court, D. Minnesota. December Term, 1882.)

### 1. INDIAN COUNTRY.

A particular portion of the public domain upon which an Indian tribe has been suffered long to remain, while other portions have been opened to settlement, or set apart particularly for Indian occupation, does not constitute such tract an Indian reservation.

### 2. SAME.

The fact that a tract of country has sometimes been referred to in treaties and official reports as the Red Lake Reservation, is not sufficient to authorize the court, in a *quasi* criminal case, to declare it to be such.

Error to the District Court. On motion for rehearing.

After the announcement of the opinion of the court in this case,\* counsel for the government asked a further hearing upon the question whether the *locus in quo* is within an Indian Reservation, and the court ordered further argument upon that question, which was had at the December term, 1882.

C. K. Davis, for plaintiff in error.

C. A. Congdon, Asst. U. S. Atty., for the United States.

McCrary, C. J. An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of congress, by treaty, or by executive order; I do not think an Indian reservation can be established by custom or prescription. The fact that a particu-

\*See 11 FED. REP. 47.

lar tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such tract an Indian reservation. Originally, all of the public domain was occupied by the Indians, and the reservation policy was adopted with a view of locating them in certain districts, and opening the remainder of the public land for white settlement. It cannot, therefore, be said that a particular portion of the public domain, upon which an Indian tribe has been suffered long to remain, while other portions have been open to settlement, or set apart specifically for Indian occupation, constitutes such tract an Indian reservation. It simply retains the character it had at the beginning, and can only be correctly designated as a tract of public land to which the Indian title has not been extinguished.

Such is the character of the *locus in quo* in this case. It comes clearly within the description of "Indian country" as defined by the act of 1834, to-wit, "territory to which the Indian title has not been extinguished." If this definition were still in force, it would exactly designate the place where the seizure was made; but, as we have heretofore held, it was repealed by the enactment of the Revised Statutes. To hold it still to be Indian country would be to give no effect to the repeal. The fact that the tract of country in question has been sometimes referred to in treaties and official reports as the "Red Lake Indian Reservation," is not sufficient to authorize the court, in a *quasi* criminal case, to declare it to be such.

The motion for rehearing is overruled.

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This case accomplishes a most anomalous result. The *locus in quo* of the seizure is the unceded country in the northern part of Minnesota, popularly called the Red Lake Indian Reservation, and occupied exclusively by the Red Lake Indians, a partially-civilized tribe. In 1863 these Indians, by treaty, extinguished their title to all territory save that in question. 13 St. at Large, 668. A part of the territory so ceded comprises the greater part of the four counties in northwestern Minnesota north of the Wild Rice river. These counties are thickly settled, are traversed by railroads and dotted with thriving villages. By article 7 of the treaty of 1863, it was provided that the laws prohibiting the introduction and sale of spirituous liquors in the Indian country should be in full force and effect throughout the country thereby ceded. It was held in *U. S. v. Forty-three Gallons of Whisky*, 93 U. S. 197, that this exclusion of spirituous liquor from the ceded territory was not only a valid but commendable exercise of the power to regulate commerce with the Indians; that article 7 was doubtless inserted through fear that the ceded lands, by reason of their proximity to the unceded lands, would be used to store liquors for sale to young men of the tribe occupying such unceded lands. But since



the principal case holds that the unceded territory is not Indian country, it follows that it is lawful to introduce liquor into the unceded territory, but unlawful to introduce it into the ceded territory, because it may thereby be the more easily introduced into the unceded territory.

**INDIAN COUNTRY.** This term was first used in the trade and intercourse acts in the act of July 22, 1790, (1 St. at Large, 137,) where it was undefined. It was used again without definition in the second trade and intercourse act, enacted March 1, 1793, (1 St. at Large, 329.) It was first defined in the third intercourse act (1 St. at Large, 469) to be the country west of an irregular line extending from the present site of Cleveland, Ohio, to the river St. Mary, Florida, (the then boundary fixed by various treaties with the several tribes and the government,) and this line was subject to variance, as subsequent treaties might vary the boundaries between the various tribes and the United States. This act having expired, it was re-enacted with the same definition March 3, 1799, (1 St. at Large, 743,) and again re-enacted, on its expiration, April 30, 1802, (2 St. at Large, 139.) Under this definition "territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes," is not Indian country. *American Fur Co. v. U. S.* 2 Pet. 368. This definition continued to June 30, 1834, when section 1 of the intercourse act, then enacted, (4 St. at Large, 729,) defined it to be "all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state to which the Indian title has not been extinguished." Under this definition the country described ceases to be Indian country as soon as the Indians part with their title, and without any further act of congress. *Bates v. Clark*, 95 U. S. 208. This definition continued until the enactment of the Revised Statutes, when it was repealed by section 5596, since the intercourse act is neither local nor temporary. The principal case reported, *Forty-three Gallons of Cognac Brandy*, 11 FED. REP. 47; *U. S. v. Leathers*, 6 Sawy. 17. But *contra*, that it is local, *U. S. v. Seveloff*, 2 Sawy. 314; *U. S. v. Tom*, 1 Or. 27; *Walters v. Campbell*, 4 Sawy. 123. And that it is not extended, *proprio vigore*, over after-acquired territory. *U. S. v. Joseph*, 94 U. S. 617.

It seems, from the principal case, that since the enactment of the Revised Statutes there is no Indian country, though an Indian reservation may be and is held to be all the Indian country there is, (*U. S. v. Leathers*, 6 Sawy. 17,) and is Indian country so as to give the United States courts in Dakota jurisdiction of murder thereon, (*U. S. v. Brave Bear*, 13 N. W. Rep. 565; *U. S. v. Knowlton*, Id. 573;) and the Indian reservations in the Indian territory are Indian country; (*U. S. v. Payne*, 2 McCrary, 289, [S. C. 8 FED. REP. 883;] and such reservation is assumed to be Indian country by the supreme court, (*U. S. v. Perryman*, 100 U. S. 235;) and so is a reservation in Colorado, (*U. S. v. McBratney*, 104 U. S. 621; *U. S. v. Berry*, 2 McCrary, 58, [S. C. 4 FED. REP. 779.] But if there is no statutory definition of Indian country, it would seem that, as regards the intercourse acts, no distinction could be drawn between uncaded country rightfully occupied by Indian tribes, and Indian reservations so called, because (1) the aboriginal title of the Indian tribes to the uncaded lands is that of occupancy alone, (*Cherokee Nation v. Georgia*, 5 Pet. 48.)

which is the same right that they have in the lands of their reservation, (*U. S. v. Cook*, 99 Wall. 591,) their reservation rights being simply a continuation of their aboriginal rights, (*New York Indians*, 5 Wall. 770; *Godfrey v. Beardsley*, 2 McLean, 416;) (2) the purpose and effect of the intercourse acts was to regulate trade and intercourse with Indian tribes which form distinct political communities, having territorial boundaries, and a right to all the and within such boundaries, (*Worcester v. State of Georgia*, 6 Pet. 557;) tribes which are governed by their own rules and traditions, with whom the government deals in their tribal character, and who hold their lands in common, with the right of occupancy only, (*U. S. v. Joseph*, 94 U. S. 617;) and therefore these intercourse acts seem to be as applicable to non-reservation tribal Indians, occupying unceded land, as to reservation Indians.

**INDIAN RESERVATIONS, HOW CREATED.** They are created by treaty, statute, or executive order, (*U. S. v. Leathers*, 6 Sawy. 17; *U. S. v. Payne*, 2 McCrary, 296; [S. C. 8 FED. REP. 883;]) and the principal case. No set form of words is necessary to create a reservation. It is enough if the words used are sufficient to indicate the purpose to reserve the land. *U. S. v. Payne, supra.* But *quære*, what words are sufficient to indicate such purpose. The *locus in quo* in the principal case was called in the treaty there construed a reservation, (section 6, 13 St. at Large, 668,) and was so called in a subsequent treaty, (13 St. at Large, 689,) and was so called by the supreme court when construing the treaty in question, (*U. S. v. Forty-three Gallons of Whisky*, 93 U. S. 197.)

**JURISDICTION OVER INDIAN COUNTRY.** Federal courts have no jurisdiction of crimes committed by a white man upon a white man in Indian country *within a state*, because such state has criminal jurisdiction over all white persons within its limits. *U. S. v. McBratney*, 104 U. S. 621; overruling on this point *U. S. v. Berry*, 2 McCrary, 58; [S. C. 4 FED. REP. 779.] But *contra*, if such country is not within a state. *U. S. v. Rogers*, 4 How. 572. But if the white man commits a crime upon an Indian, *e. g.*, steals his blanket, the federal courts have jurisdiction of the offense, though the reservation on which it is committed is within a state, because of the power to regulate intercourse between the Indian and the white man, even in a state, (*U. S. v. Bridleman*, 7 FED. REP. 894;) and under its power to regulate commerce with the Indians, the exclusion of liquor from Indian country within a state is constitutional, (*U. S. v. Forty-three Gallons of Whisky*, 93 U. S. 188.) A state court can punish an Indian who commits adultery with an Indian upon a reservation within a state. *State v. Doxtater*, 47 Wis. 278; [S. C. 2 N. W. REP. 436.] But the civil laws of the state do not extend to an Indian country within a state, (15 Minn. 369,) nor to Indians maintaining tribal relations. *U. S. v. Payne*, 4 Dill. 389.

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## LINTON and Wife v. MOSGROVE and others.

(Circuit Court, W. D. Pennsylvania. November Term, 1882.)

## EQUITY—ENJOINING PROCEEDINGS IN STATE COURTS.

Section 720 of the Revised Statutes, which forbids United States courts to grant injunctions to stay proceedings in a state court, does not restrain the circuit court from enjoining an inequitable use of a trust judgment in a state court by execution and levy, prosecuted in violation of the trust and in fraud of the rights of the *cestui que trust*.

## In Equity.

ACHESON, D. J. The subject-matter of this suit is a trust of real and personal property, evidenced by an instrument of writing executed by the trustee, James E. Brown, defendants' testator. The surviving *cestui que trust* is Mrs. Linton, one of the plaintiffs, in whose behalf the suit is prosecuted. Beyond question the case presented by the bill is of equitable cognizance, and it is equally clear that in virtue of the citizenship of the parties this court has jurisdiction of the controversy.

It is alleged that the judgments in the state court recited in the bill belong to the trust, and that Mrs. Linton is now the owner thereof under the terms of the trust; and one of the prayers of the bill is to have the trust in respect to said judgments judicially declared and enforced in favor of Mrs. Linton, and the judgments assigned to her. To this relief, it would seem, she will be entitled if the allegations of the bill are sustained. We are now asked to restrain the defendants, until further order, from exercising any acts of ownership over the said judgments, or in anywise interfering with the same. If the plaintiffs' allegations are true, the defendants—the personal representatives of James E. Brown, deceased—are making a most inequitable and unwarrantable use of the judgments by means of executions and levies, in violation of the trust, and in fraud of the rights of Mrs. Linton.

Is this court powerless to arrest such wrong by reason of the statutory provision which forbids the courts of the United States to grant injunctions to stay proceedings in a state court? Rev. St. § 720.

I am of opinion that the case is not within the purview of the prohibition. It is not proposed to interfere with the rightful authority of the state court in any proper sense. The contest here relates to the ownership of the judgments. It is alleged, and for the purpose of this motion it may be assumed to be satisfactorily shown, that they

belong to Mrs. Linton; and, if so, the defendants have no right to intermeddle with them. If these judgments appertain to the trust which is the foundation of this suit, they are an inherent part of the controversy, and must enter into our final decree if complete justice is to be done; and strange indeed would it be were this court impotent to restrain a trustee subject to our general equitable jurisdiction from making a fraudulent use of a trust judgment standing in a state court. Surely there can be no such defect in our judicial system.

Under the admissions in the defendant's affidavits I think the present motion should be allowed without requiring security. By virtue of the judgments of revival and the execution attachments, every possible lien against the entire estate, real and personal, of the late Mrs. Finlay has been acquired. Should the controversy not terminate within five years from the date of the revival of the judgments, we will allow *alias* writs of *scire facias* to issue.

The injunction prayed for is allowed, the same to remain in force until the further order of the court.

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### UNITED STATES v. HOUGHTON.

(District Court, D. New Jersey. October 20, 1882.)

#### 1. CRIMES—FALSE MAKING OF PUBLIC RECORD—ELEMENTS OF OFFENSE.

In order to a conviction of the offense defined in section 5418 of the Revised Statutes, the jury must be satisfied beyond a reasonable doubt (1) that the time and pay roll described in the indictment was a false, forged, and counterfeit writing; (2) that the same was transmitted to the proper officer of the government by the defendant; and (3) that the false character of the writing was known by the defendant at the time of the sending, and that it was sent with the intent to defraud the United States.

#### 2. SAME—DEFENDANT AS WITNESS—WEIGHT OF TESTIMONY.

The laws of the United States permit a person charged with crime or misdemeanor to be a witness in his own behalf, and such weight is to be given to his testimony as, under all the circumstances, it is fairly entitled to.

#### 3. SAME—GUILTY KNOWLEDGE—PRESUMPTION.

In criminal as well as civil affairs every one is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry, and this knowledge must be affirmatively shown by the government.

#### 4. SAME—EVIDENCE OF.

Proof of other acts, which have no connection with the principal transaction, is admissible in cases where the knowledge or intent of the party is a material fact.

## 5. SAME—A QUESTION OF FACT.

The question of guilty knowledge of the defendant in a criminal case is a question of fact for the jury.

## 6. SAME—FALSE CERTIFICATES OF SERVICES.

It is not lawful for an official to accept an office and then use false means and methods to obtain money for carrying it on, as by certifying charges for boat service, the expenses of janitor's fees, carriage hire, ice, gas, etc., in order to obtain money from one department for services which had been rendered in another, and for the payment of which the government has made no provision.

## 7. SAME—INTENT AND ACT MUST UNITE.

No man is to be punished as a criminal unless his intent is wrong, and such wrong intent must be followed by a wicked act to give it force and effect.

## 8. SAME—INTENTION INFERRED FROM ACT.

If one intends to do what he is conscious the law forbids, no other evil intent need be shown. In such case the law infers the intent to defraud from the act, and guilty knowledge of the false character of the pay-roll, when transmitted, is sufficient to raise the inference of a fraudulent intent.

NIXON, D. J., (*charging jury*.) While the counsel of the respective parties have been engaged with so much zeal, labor, and ability in discussing before you the facts of this case, I have taken occasion to make note of certain suggestions in regard to the law, which I will now submit to you, after which the entire responsibility of its decision must rest with you.

The case lies within a narrow compass—much narrower than one would suppose when he considers the wide range which the testimony has taken.

Section 5418 of the Revised Statutes of the United States enacts "that every person who \* \* \* transmits to or presents at the office of any officer of the United States any false, forged, altered, or counterfeited bid, proposal, guaranty, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States," shall be deemed guilty of a misdemeanor and punished.

The defendant is the collector of customs for the district of Perth Amboy, and is charged in the indictment with transmitting to and presenting at the office of the secretary of the treasury a false, forged, and counterfeited writing, to-wit, "a time and pay roll of persons employed in the collection of the revenue from customs in the district of Perth Amboy, from September 1 to September 30, 1879, containing a certain affidavit, purporting to have been taken by nine several boatmen, therein mentioned, before one J. Kearney Smith, he (the collector) then and there knowing the same to be false, forged and counterfeited. for the purpose of defrauding the United

States, by causing the false, forged, and counterfeited time and pay roll to be accepted and received by the secretary of the treasury as a good and sufficient voucher for the several sums therein mentioned, and causing the said sums to be allowed and credited to him on the settlement of his accounts as collector, respecting the disbursement of moneys intrusted to him for the disbursement in payment of boatmen employed by him as such collector. Before the United States can properly ask for a conviction of the defendant, you must be satisfied by the evidence, beyond a reasonable doubt, (1) that the time and pay roll described in the indictment was a false, forged, and counterfeited writing; (2) that the same was transmitted to the proper officer of the government by the defendant; and (3) that the false character of the writing was known by the defendant at the time of the sending, and that it was sent with the intent to defraud the United States.

The first and second of these propositions have not been seriously contested, and the case turns upon the last, to-wit, the knowledge of the defendant as to the true character of the writing, and his intent to defraud the government. The responsibility of deciding the case is on you. It is the duty of the court to instruct you as to the law, but you must determine the facts, and your verdict must be based upon your honest judgment of the facts. You will remember, at the outset, that the defendant can only be convicted, if at all, upon the time and pay roll of the month of September, 1879. The indictment charges that one only to be false and fraudulent, whatever may be the proof in regard to others. The other pay-rolls were either brought into the case by the defendant to show the methods by which the business of the collector's office was conducted, or were admitted by the court, at the instance of the prosecution, as tending to aid the jury in reaching a correct conclusion on the single question of the knowledge of the defendant of the true character of the one on which the indictment is founded.

The laws of the United States permit a person indicted for a crime or misdemeanor to be sworn in his own behalf. The defendant in this case has been placed upon the witness stand, and it is your duty to give such weight to his testimony as you think, under all the circumstances, it is fairly entitled to. He substantially admits the false and forged character of the pay-rolls for the boat service, and especially the one for the month of September, 1879, and it may be said that he acknowledges that he transmitted the same to the proper officer in Washington. His statement is that he certified to the cor-

rectness of all of them, and that sometimes he forwarded them himself, and sometimes they were handed back to the deputy collector to be transmitted. But he was chargeable, as collector, with the performance of the act, and in law it is the same whether he sends it personally or through his deputy.

The only questions left are in regard to the knowledge of the defendant of the falsity and forgery of the pay-roll, and the intent for which it was sent.

1. In regard to his knowledge. Did he know, at the time of his certification of its truth and its transmission, that it was untrue, and false and fraudulent? What is legal knowledge of a fact? There is great misapprehension in the popular mind on this subject. There seems to be a prevalent notion that no one is chargeable with more knowledge than he chooses to have; that he is permitted to close his eyes, when he pleases, upon all sources of information, and then excuse his ignorance by saying that he does not see anything. In criminal as well as civil affairs every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry. This knowledge of the defendant must be affirmatively shown by the government. Except in the case of confession it is generally impossible to make it out by direct evidence, and can only be inferred from overt acts. Wharton, in discussing the subject, says that if the knowledge cannot be implied from the facts and circumstances which, together with it, constitute the offense, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. It was on this principle that other pay-rolls were admitted in the case, and evidence was received tending to prove their false or fraudulent character. As I have before suggested, the defendant on this indictment cannot be convicted on their falsity, but the jury have the right to infer his knowledge of the falsity of the pay-roll on which he has been indicted, if they are persuaded by the testimony that he had knowledge of the false character of the others. It is admissible to prove other acts which have no connection with the principal transaction, in those cases where the knowledge or intent of the party is a material fact; as, for instance, in an indictment for knowingly uttering a forged document, proof of the possession, or of the prior or subsequent utterance of other false documents, though of a different description, is admitted as material to the question of guilty knowledge or intent. 1 Greenl. Ev. § 53.

The defendant, on the witness stand, denied any knowledge of the falsity, not only of the pay-roll on which he was indicted, but of all the others. Incidentally admitting their false character, he excused himself from knowledge of the fact by stating that all the matters connected with the boat service of his office were left in the hands of his deputy, J. Kearney Smith, and that if any fraud had been committed he alone was responsible. The deputy, Mr. Smith, denied this statement, and testified that the defendant had full knowledge of the manner in which the pay-rolls were made up at the time that he certified to their truth, and to the necessity of the service alleged to have been performed. I regard this as the vital question in the cause, and you, gentlemen, must find the truth, if you can, out of the conflicting testimony. In order to do this, you will carefully consider the evidence which has been produced,—on the one side, to prove to you the defendant's knowledge of the falsity of the pay-roll, and on the other, to satisfy you that he was ignorant of its true character. I express no opinion on the subject, and leave the question for your determination.

Sometimes the court deems it important to marshal the facts specifically on the one side and the other to enable the jury more clearly to reach a correct conclusion. I shall not do it in this case, because I have left the very able counsel, representing both sides, ample time and latitude in summing up the evidence, and your patient attention is the best security and guaranty that it is not necessary for me to detain you by a recapitulation. What, then, is your honest and impartial judgment as to the defendant's knowledge? Has the government shown to you facts respecting his conduct in the business of his office, or specific acts by him in regard to the other pay-rolls from which you can fairly infer his knowledge of the falsity of this pay-roll?

In this connection there is one position which was not very openly taken, but has been more than once gently suggested, by the counsel for the defendant, to which I ought to advert, to-wit, that as no provision was made by the department at Washington for the payment of certain expenses of the office, deemed necessary by the collector, such as janitor's fees, carriage hire, ice, gas, sprinkling the streets, etc., the names of persons doing such work, but performing no boat service, were placed upon the pay-rolls, and properly paid from the money furnished alone for the boat service. My charge to you here is: that if the defendant knew when he transmitted the pay-roll to



Washington that it contained charges for boat service which had not been rendered, then he had knowledge of its false character; unless, indeed, you are satisfied that such charges were made with the approval of the proper department of the government. He cannot excuse himself by saying that the work was done somewhere else in the office, and that he charged it here because the department would not make allowances for payment out of any other money of the government.

It may be true, as the learned counsel of the defendant suggested, that the United States is a hard task-master; that it often requires unreasonable things from its officials. But whether that be so or not, it is not lawful for an official to accept of an office, and then use false means and methods to obtain money for carrying it on. He may resign if the government is unjust or exacting, but he cannot certify to falsehoods in order to obtain money from one department for services which had been rendered in another, and for the payment of which the government has made no provision. Unless you are satisfied beyond a reasonable doubt that the defendant was aware of the falsity of the pay-roll when he transmitted it, the case ends, and the defendant is entitled to your acquittal. The indictment charges, and the law requires the government to prove, a guilty knowledge of its character before there can be a conviction.

2. But if you are so satisfied, then you will proceed to the consideration of the only remaining inquiry, whether it was sent with the intent to defraud the government. Not much need be said upon this point. It is a fundamental doctrine of the law that no man is to be punished as a criminal unless his intent is wrong, and such wrong intent must, ordinarily, be followed by a wicked act—the mere intention not injuring any one, unless developed into some act to give it force and effect. Thus, a man may determine in his own mind to rob or defraud his fellow on some favorable opportunity. Such an intent, deliberately formed, renders him morally guilty, but he does not become legally liable until he takes steps to carry his intent into execution. It is not necessary, in the present case, for the prosecution to prove that the government has been actually defrauded. The indictment charges only an intent to defraud. The rule here is, as stated by the best authorities, that if a man intends to do what he is conscious the law, which every one is presumed to know, forbids, there need not be any other evil intent shown. In such a case the law infers the intent to defraud from the act. If you are convinced that the defendant knew the false character of the pay-

roll when he transmitted it to the government, you are not obliged to look further than that to find a fraudulent intent on the part of the defendant.

With these remarks I leave the case with you. If you have any reasonable doubt, after carefully considering the testimony, about the guilt of the defendant, give him the benefit of the doubt and acquit him. If you have not, do not let the sympathy which you and all of us feel for the defendant in these trying circumstances deter you from fearlessly and honestly discharging your duty; but let your verdict be such that the government and all other officials may learn that in this court punishment follows the transgression of the law.

The jury found a verdict of guilty, with a recommendation of mercy.

See *U. S. v. Wentworth*, 11 FED. REP. 52.

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UNITED STATES *v.* WILLIAMS and another.

(District Court, E. D. Wisconsin. 1882.)

CRIMINAL LAW—USING PLATES WITHOUT AUTHORITY—FRAUDULENT SECURITIES.

The defendants were convicted, under section 5430, of the Revised Statutes, of the offense of having in their possession an instrument engraved and printed after the similitude of an obligation issued under the authority of the United States, with intent to sell or otherwise use the same. The alleged fraudulent instrument, though in the similitude of a United States bond, was not, nor did it purport to be, executed, or signed. The court, in granting a new trial, held that the words of the statute, "any obligation or other security," must be construed to mean an executed instrument, or one which on its face purports to be executed, and that it appearing that the alleged fraudulent obligation or security is not an obligation or security at all, within the meaning of the statute, a conviction cannot be sustained, though the paper, in its body and general form, be made after the similitude of a United States bond. It is for the court to determine whether the case made is within the statute.

*G. W. Hazelton*, for the United States.

*N. S. Murphey*, for defendants.

DYER, D. J. The defendants have been convicted, under section 5430 of the Revised Statutes, of the offense of having in their possession an obligation engraved and printed after the similitude of an obligation issued under the authority of the United States, with intent to sell or otherwise use the same. A motion for a new trial has been argued and is now to be decided. It was shown on the trial,

by the testimony of a bank expert, that the instrument which the defendants had in their possession and attempted to exchange for money resembles in color, style of printing and engraving, and in general appearance, a 5-20 government bond. The same witness testified that in form and size it differs from a genuine government bond, and, in fact, examination of the instrument shows that it purports to be, not an obligation of the United States, but an obligation of the United States Silver Mining Company, of Denver City, Colorado, by which that company acknowledges itself to be indebted to the bearer in the sum of \$1,000, payable at the American Exchange National Bank, in the city of New York, March 1, 1890, with interest at 7 per cent. On the face of the instrument is printed in large gilt letters the word "Gold," and interest coupons, payable semi-annually, are annexed. At the foot of the bond and of each coupon are printed the words "Prest." and "Secy.," with spaces left before each of those words for signatures; but no signatures are written or printed in the spaces thus left for the purpose, so that on the face of the paper it appears to be an unexecuted instrument.

On the trial the court held that to constitute the offense declared in the statute referred to, it was not essential that the fraudulent or fictitious obligation should in terms purport to be an obligation of the United States. And following the ruling, as here produced in manuscript, of Judge CALDWELL, of the eastern district of Arkansas, in *U. S. v. Wilson*, understood to be unreported, the court charged the jury that "to constitute an offense under the statute it is not necessary that the similitude between the false and the true security should be such as to deceive experts, bank officers, or cautious men. It is sufficient if the alleged fraudulent bond bears such a likeness or resemblance to any of the genuine bonds of the United States as to be calculated to deceive an honest, sensible, and unsuspecting man, of ordinary observation and care, dealing with a man supposed to be honest. If it does, then the similitude required by law to make out the offense exists."

The court further charged the jury that where the similitude is of the character stated, the offense is not disproved by showing that the alleged fraudulent bond bears no signature, or that careful examination discloses that it does not purport to be a bond of the United States, but that on the contrary it purports to be a bond issued by some mining company. There was clearly no error in holding that to constitute the offense it is not essential that the fraudulent bond or instrument should on its face purport to be an obligation of the

United States. The language of the clause in section 5430, upon which the indictment is based, is that every person "who has in his possession or custody, except under authority from the secretary of the treasury or other proper officer, *any obligation or other security* engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same," shall be punished, etc. The object of this statute evidently was to make it unlawful for any person to have in his possession, without proper authority, and with intent to sell or otherwise use the same, any obligation or security, whether purporting to be, but not, in fact, issued under the authority of the United States, or purporting to be, or, in fact, made or issued by any individual or any public or private corporation, engraved and printed after the similitude of a genuine obligation or security of the United States. No other construction of the statute is consistent with its language and evident meaning.

The serious question involved in the case at bar is, must not the instrument claimed to be made after the similitude of a government obligation or security, be in fact, or purport to be, an executed obligation or security, to make a case within the statute? Of course, the defendants cannot be prosecuted in this court on the ground that they are confidence men, or that they have attempted to perpetrate a fraud. Their prosecution must proceed wholly under this statute, and their conviction must rest wholly upon proof of the charge that they unlawfully had in their possession an *obligation* made after the similitude of an obligation of the United States. As we have seen, the words of the statute are that every person who has in his possession "*any obligation or other security*," etc. The words "obligation or other security," as here used, seem clearly to imply an executed instrument, or at least one which on its face purports to be executed by somebody. In the case in hand, the false or bogus bond bears no signatures whatever. It is a mere blank, so far as signatures or execution are concerned. Can it, then, be said to be *an obligation or security*, or to be even a pretended obligation or security? True, it is a paper made after the similitude of a United States bond, but it is unexecuted, unsigned by anybody; in that regard, as just observed, it is a blank, and there is not on its face even a pretense of execution by any person or corporation. The statute was aimed at the issue or execution, whether real or pretended, of obligations or securities made after the similitude of the obligations or securities of the United States; and I am constrained to believe that what

is meant by the language of the section referred to, is an instrument that is either in fact executed or purports to be executed by somebody. Otherwise, it is not and does not purport to be an obligation.

Very forcible argument was made by the learned district attorney that the instrument in question, though bearing no signatures, may be as effectually used for the purposes of deception and fraud as in case it purported to be executed or signed. This may be so; but, after all, the court cannot supply omissions in the statute, but must accept and construe the statute as we find it; and if the case in hand does not come within the letter and meaning of the statute, it is the duty of the court so to decide. The instrument in evidence is not an obligation or other security, and does not purport to be such, because it was never executed or signed by anybody, and therefore it is not such an instrument as the statute covers. In that respect it is no more than a blank piece of paper.

It was also argued by the district attorney that the fact that the instrument in evidence was not signed or executed should be treated by the court as merely a fact entering into the principal question of similitude to be submitted to the jury; and as the jury have found that the alleged similitude exists, notwithstanding the absence of such signatures as would make the instrument either an actual or pretended obligation, the court cannot disturb the verdict. In other words, the contention is that the non-execution of the instrument or paper is merely a fact bearing upon the question of similitude, and that it is the province of the jury alone to say, in the light of all the facts, whether the alleged similitude exists or not. This was the view to which the court was inclined when the question first arose; and in support of the proposition thus stated, counsel have cited *U. S. v. Morrow*, 4 Wash. C. C. 733. That case, however, only holds that in a case of forged coins the question of resemblance or similitude is one for the jury, and this no one will dispute. But when a statute, as in the present case, declares, in effect, that the false instrument must be an *obligation* or *security*, it cannot be that because the question of similitude is one for the jury, the court is not to determine whether the case made is within the statute. Whether the instrument is an *obligation* or not is a question as to its legal effect. That is a question for the court, and if it is apparent that the alleged fraudulent obligation or security is not an obligation or security at all, within the meaning of the statute, it must follow that a conviction cannot be sustained, although the jury have determined that the

paper in evidence, in its body, and general form and style, is made after the similitude of a United States bond.

The case of *People v. Ah Sam*, 41 Cal. 645, was referred to on the argument, but it is inapplicable to the case at bar. In that case the defendant was indicted for having in his possession blank and unfinished bank bills, in the form and similitude of a bill for the payment of money, with intent to fill up and complete the same; and the statute under which the indictment was found declared it to be an offense to have in possession blanks having the form or similitude of bills for the payment of money, etc.

On the whole, my opinion is that the conviction of the defendants cannot be sustained. They undoubtedly attempted to commit a gross fraud; but the statutory offense of which this court has jurisdiction, is not established. The difficulty in the way of maintaining a conviction is attributable to a defect in the statute, and that defect congress alone can remedy. Motion for new trial granted.

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### UNITED STATES *v.* SNYDER and another.

(Circuit Court, D. Minnesota. February, 1882.)

#### 1. CRIMINAL LAW—FRAUDULENT RETURNS OF POSTMASTER.

Any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished under the provisions of chapter 259, vol. 20, St. at Large, (2 Supp. Rev. St. 358.)

#### 2. SAME—AIDERS AND ABETTORS—AS PRINCIPALS.

The statute above cited is not limited in its operation to the conviction and punishment of the postmaster guilty of the offense alone, but may be extended to all persons aiding, abetting, and assisting in the commission of the crime, who are alike guilty of a misdemeanor under the statute, and may be indicted and convicted thereunder as principals.

#### 3. SAME—PUNISHMENT OF AIDERS AND PROCURERS.

All aiders, procurers, or abettors in statutory offenses are punishable as principals, under the statute, although not expressly referred to in the statute, and that a defendant, though incompetent to commit the offense, as principal, by reason of not being of the particular age, particular sex, condition, or class, may nevertheless be punished as procurer or abettor.

#### 4. INTENT OR MOTIVE—EVIDENCE OF OTHER SIMILAR ACTS.

Where the question is one of a fraudulent intent, it is allowable, as well in criminal as in civil cases, "to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish the intent or motive in the particular act directly in judgment."

## 5. SAME—TRANSCRIPT OF AUDITOR OF DEPARTMENT.

It was *held* proper to admit in evidence the transcript of the report described in the indictment, duly certified by one of the auditors of the treasury for the post-office department.

## 6. EXCEPTION—ERROR.

Exception having been taken, on previous trial of this case, to the statement by the district attorney, in his argument before the jury, to the effect that the failure of the defendant to testify in his own behalf should raise presumption against him, *held*, that it appearing on the records of such previous trial that the judge in his charge had corrected the remark, and stated to the jury that such language by the district attorney was wrong, cured whatever error there was in such statement.

The defendants are indicted under chapter 259, vol. 20, St. at Large, (Supp. to Rev. St. vol. 1, p. 358,) which provides that "any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation under the provision of this or any other act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not less than fifty nor more than five hundred dollars, or imprisonment for a term not exceeding one year, or punishment by both such fine and imprisonment, in the discretion of the court." The defendant Snyder was postmaster at Germania, Minnesota. The defendants are jointly charged in the indictment with having willfully, etc., made a false return to the auditor of the treasury of the United States for the post-office department, for the purpose of fraudulently increasing the compensation of the said Mait. Snyder, as such postmaster, under the provisions of an act of congress mentioned in the indictment. There was a trial in the district court, which resulted in a verdict of guilty against Bertram, who moved for a new trial, and in arrest of judgment, upon grounds which are stated in the opinion. The case having been certified into this court by the district judge, has been here argued.

C. A. Congdon, Asst. U. S. Atty., for the Government.

O'Brien & Wilson, for defendant.

MCCRARY, C. J. 1. The first and most important question presented by this record is whether defendant, Bertram, not being a postmaster, can be indicted and punished under the above-mentioned act of congress. That act, by its terms, applies only to postmasters, and the question is whether any other person can be found guilty of a misdemeanor under it. The record in this case shows that the defendant Bertram was guilty of aiding, abetting, and assisting Snyder in the commission of the crime. He in fact prepared with his own hand the false reports, and, knowing them to be false,

advised and induced Snyder to sign them. Upon careful consideration, we have reached the conclusion that this was an offense against the statute, notwithstanding the fact that only postmasters are named therein. The offense is a statutory misdemeanor; and it is well settled that all who aid, abet, procure, or advise the commission of a misdemeanor are guilty as principals. 1 Russ. Crimes, (9th Ed.) 60, note 1. And this is the rule whether the misdemeanor is created by statute or by the common law. *U. S. v. Mills*, 7 Pet. 138.

When congress creates a statutory misdemeanor we must assume that it is done with the above well-settled rules of law in view, and if so, with the intent that aiders and abettors, as well as the actual doers of the crime, may be punished under it. The rule that all procurers and abettors of statutory offenses are punishable under the statutes, although not expressly referred to in the statute, is supported by authority. Bish. St. Crimes, 36; *Com. v. Garnet*, 1 Allyn. 7; *U. S. v. Harbison*, 1 Int. Rev. Rec. 118; *U. S. v. Bayer*, 4 Dill. 407.

Although the defendant, Bertram, not being postmaster was incapable of being the principal actor in the commission of the crime, he may nevertheless be held to be an aider, procurer, and abettor, and therefore, in law, a principal. It has been adjudged repeatedly that the fact that a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as procurer or abettor. *State v. Sprague*, 4 R. I. 257; *Boggus v. State*, 34 Ga. 275; *Rex v. Potts*, Russ. & R. Cr. Cas. 352; Bish. Crim. Law, 627-629; *U. S. v. Bayer*, *supra*. This doctrine is also supported by reason, for if it were not sound there could be no punishment of the crime of procuring a postmaster to defraud the United States by making false returns, even although the procurer might share in the proceeds of the fraud, and be actuated by the worst of motives.

2. The offense charged was the making of false returns for the quarter ending December 31, 1880. The prosecutor was allowed, against the objection of defendant, to introduce in evidence, not only the false returns for that quarter, but other similar returns for other periods before and after the time covered by the indictment, all being in the handwriting of the defendant, Bertram. There was no error in this ruling. Where the question is one of fraudulent intent, it is allowable, as well in criminal as in civil cases, "to introduce evidence of other acts and doings of the party of a kindred character, in order



to illustrate or establish his intent or motive in the particular act directly in judgment." *Wood v. U. S.* 16 Pet. 342.

3. It is insisted that defendant has been unlawfully convicted upon the uncorroborated testimony of an accomplice. It is true that the principal witness against defendant, Bertram, was his co-defendant and accomplice, Snyder, but it is not true that Snyder's testimony is uncorroborated. It is strongly supported by the testimony of Harris and Scanlon, who testify to facts tending to prove that the reports in question must have been false; by the letters from Bertram to Snyder, which are in evidence, and which show pretty clearly a knowledge of the crime and a desire to suppress the truth; and by the fact that the reports were all in Bertram's handwriting.

4. Exception is taken to the remarks of the district attorney, in his argument before the jury, to the effect that the failure of Bertram to testify in his own behalf should raise a presumption against him. This was improper, and if the court had failed to correct it on trial it might have been error. But the record shows that the court at once instructed the jury, and repeated it in the final charge, that such language by the district attorney was wrong, and that no presumption should be taken against the defendant because he did not testify in his own behalf. This cured whatever error there was in the remarks of the district attorney. If this were not so, it would be within the power of counsel, by such remarks, to invalidate the proceedings in any criminal case. *Ruloff v. People*, 45 N. Y. 213.

5. The transcript of the quarterly report described in the indictment, duly certified by the sixth auditor of the treasury for the post-office department, was properly admitted in evidence. *Rev. St.* § 889.

The motion in arrest of judgment must be overruled.

NELSON, D. J., concurs.

## HAFF v. MINNEAPOLIS &amp; ST. L. RY. Co. and others.

(Circuit Court, D. Minnesota. December Term, 1882.)

## 1. NEGLIGENCE—PERSONAL INJURIES—PROXIMATE CAUSE—DAMAGES.

To obtain a verdict for damages by reason of alleged negligence, it must be proven that the negligence of the defendant was the proximate cause of the injury.

## 2. SAME—RAILROAD COMPANY—DUTY UNDER LEASE.

A railroad company, having by lease the right to use the depot grounds and tracks of another company, owes the same duty to passengers of that company lawfully on the ground as it does to its own.

## 3. SAME—DUE DILIGENCE.

The question, what constitutes "due diligence?" in an action to recover damages caused by negligence, is one for the jury, and the *burden of proof* in such case is with the plaintiff to show the negligence.

## 4. SAME—CONTRIBUTORY NEGLIGENCE—CHOICE BETWEEN HAZARDS.

Where one, in the face of great danger, and obliged to choose between two hazards, makes such choice as a person of ordinary prudence and care placed in the same situation might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury will not relieve the one by reason of whose negligence he was put in jeopardy.

## At Law.

A suit is brought against both defendants, seeking to hold them liable for a personal injury sustained by their negligence. The Minneapolis & St. Louis Railway Company owned the depot grounds and track where the injury occurred, and had by lease permitted the Burlington, Cedar Rapids & Northern Railway Company to use them in common. The injury is alleged in the pleading to have been the result of the carelessness of the Burlington, Cedar Rapids & Northern Company while running its engine over the main track used by both companies. It is claimed both companies are liable. Additional facts appear in the charge of the court.

*Lovely & Morgan*, for plaintiff.

*J. D. Springer*, for defendants.

NELSON, D. J., (*charging jury*.) The issue in this case has been simplified so that it will not be necessary for me to detain you long. I will suggest (as I stated when the testimony was closed) that there is no cause of action against the Minneapolis & St. Louis Company, and your verdict must be in favor of that defendant. That leaves the action to proceed against the Burlington, Cedar Rapids & Northern Company.

This suit is brought by the plaintiff, a citizen of Michigan, to recover damages for a personal injury resulting from the negligence, as

he claims, of the defendant, the Burlington, Cedar Rapids & Northern Company. The injury, resulting in the amputation of a leg, occurred at a railroad crossing in the depot grounds at Albert Lea, in this state, and was inflicted by a locomotive belonging to the Burlington, Cedar Rapids & Northern Company, and operated by its employes.

These depot grounds are owned by the Minneapolis & St. Louis Company, a corporation created by the laws of the state of Minnesota, and authorized to build and operate a railroad through Albert Lea, in the direction of Fort Dodge, Iowa. The Burlington, Cedar Rapids & Northern, an Iowa corporation operating a road from Burlington, Iowa, to Albert Lea, is authorized by the laws of this state to make running connections with the Minneapolis & St. Louis, and hold a lease of the depot grounds, granting certain rights and privileges thereto. Both roads have running connections, and there is a continuous rail leading from the terminus of one to the other, and both use the same depot grounds and yards. The track where the injury occurred was used in common by both companies. They also ran a through express train from Minneapolis to Chicago; the Minneapolis & St. Louis Company, by its engine, running a train which was made up in Minneapolis to Albert Lea, where this engine is cut off, and the train, taken by an engine belonging to the Burlington, Cedar Rapids & Northern Company, proceeds south on its way.

The injury being inflicted by a locomotive of the defendant company, it is claimed that it is liable for the injury which the plaintiff received.

The gist of this action is negligence,—the failure to perform a duty the defendant owed to the plaintiff which the law imposed. The plaintiff is not entitled to recover damages because he was run over and severely injured by a locomotive owned and operated by the defendant. He must prove to you that the negligence of the defendant was the proximate cause of the injury sustained by him before he is entitled to a verdict.

Before proceeding to instruct you upon the law applicable to this case, I would preface my remarks by saying that it is your duty in the consideration of this case to mete out even-handed justice to the parties to this controversy. The fact that the defendant is a corporation entitles it to no less rights at your hands, and to the same measure of justice, as if it was a private individual. And while we must hold a railroad corporation to the strictest accountability in the discharge of its duties and liabilities, we are also to look to it that all

persons having contract relations with such corporations (as passengers or others to whom it owes a duty) exercise the requisite care and caution for their safety, as the law requires.

Let us now examine the legal aspect of the case, and, in so doing, I shall only detail such portions of the evidence as are necessary to enable you properly to apply the law. There are some undisputed facts in this case. The plaintiff took the through Chicago train on July 19, 1882, at Waseca for Albert Lea, and arrived at the depot of that station about midnight. The depot is located west of the town, and in order to reach the hotel it is necessary to pass over the main track in going from the depot grounds. The plaintiff had paid his fare to the Minneapolis & St. Louis Company, having purchased a round-trip ticket from Albert Lea to Waseca and return. On his arrival at Albert Lea he entered a depot wagon, owned by the Hall House proprietor, and submitted himself to the control of the driver, who proceeded to make the crossing and pass over it on his way to town. While crossing, or just at the point of crossing, or at some point while making the attempt, a locomotive belonging to the defendant appeared in view, the plaintiff jumped from the wagon, and the injury was inflicted in the manner detailed to you by the evidence.

The defendant, the Burlington, Cedar Rapids & Northern Company, having by lease the right to use the depot and grounds, and the tracks laid therein, owed the same duty to passengers of the Minneapolis & St. Louis road, who were lawfully at the depot and on the grounds, as it does to its own passengers; and if the injury resulted solely from the careless and negligent manner in which it ran its locomotive over the track where the defendant had the right to be, and was invited to cross, it is liable for damages occasioned thereby. It was the plain duty of the defendant to take such precautions to avoid injury to passengers who travel over this crossing as ordinary prudence would suggest. It is urged by plaintiff that the defendant did not exercise the requisite care for his safety, and that it was negligent in not furnishing safe and secure egress from its depot; that it did not use the utmost care in providing against the injury which occurred; and that the injury would not have happened with reasonable precautions on the defendant's part to make the egress safe. On the other hand, the defendant says that it owed no duty to this plaintiff which was not carefully and diligently performed, and that all the diligence which was required under the circumstances was used. This presents the issue for you to determine, and the burden

of proof is upon the plaintiff to establish it to your satisfaction; that is, the burden of proof is upon him to establish negligence. He is required by the weight of evidence to prove that the cause of the injury was the defendant's negligence.

Now, what was defendant's duty with reference to this crossing, over which travelers were invited to cross in going to and from the depot? It was the duty of the defendant to have a safe passage-way for the benefit of travelers over this crossing; it owed this duty to the plaintiff. He had arrived at the depot at midnight, a dark night, which fact required vigilance on the part of the company to protect him, and demanded the exercise of such care as would be necessary to secure his safe exit from the depot grounds. If it was necessary, in your opinion, from the surroundings, as disclosed by the evidence, in order to secure a safe exit, that the crossing should be lighted, or a flag-man stationed at that point, and if you believe that the injury sustained by the plaintiff was the result of a failure to furnish a light or a flag-man, the failure so to do on the part of the defendant is negligence. On the other hand, if you believe that all the necessary warning was given by the defendant, that the locomotive bell was rung, and that the conductor cried out and gave sufficient warning not to cross, and other employes warned and cautioned the parties that an engine was approaching, and that a light at the crossing or a flag-man was not necessary to give safe egress to the plaintiff, then such failure was not a want of care and caution on the part of the defendant.

You are to settle this issue, and, from a close examination and consideration of the evidence, satisfy your minds upon this point. If there was no negligence, then the verdict must be for the defendant; if, however, the evidence satisfies you that the defendant was negligent, and this injury resulted from its negligence, then the plaintiff, if free from fault, is entitled to a verdict. The theory of the defendant is that the injury resulted from the negligence of the driver of the wagon. The plaintiff submitted himself to the control of this driver, and if the cause of the injury was the driver's neglect the plaintiff cannot recover. The driver's negligence was his negligence, and he must take the consequence.

The defendant, however, cannot be relieved from the exercise of the necessary care and caution for the protection of the driver. He was not a trespasser. The company knew he was there, and that he could not depart from the grounds without passing over the track at

the crossing where this injury occurred. Knowing these facts, the person in charge was required to exercise great caution in running a locomotive over this crossing, and if care for his safe egress was not exercised, the defendant is guilty of negligence; and if his negligence caused the injury, the plaintiff is entitled to a verdict at your hands. It is in evidence that the plaintiff jumped from the wagon at the crossing, either on it or when the driver made an attempt to cross, and that the injury resulted from this act on the part of the plaintiff, and not from the negligence of the defendant. You will remember the evidence as to how and where the plaintiff jumped from this wagon, and I shall not repeat it. I think the rule applicable where contributory negligence is set up as a defense is the one which is to be applied in this case, and this is it: If the plaintiff was placed, by want of care of the defendant, in such a position that at the moment, and in the face of a great and threatening peril, he was obliged to choose between two hazards, and he makes such choice as a person of ordinary prudence and care, placed in the same situation, might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury does not relieve the defendant from liability for its own negligence. The question is, was the injury inflicted upon plaintiff the result of defendant's negligence?

I am requested by defendant's counsel to charge you as follows, which I do:

(1) "If Hall was keeping a hotel at Albert Lea at the time of the accident in question, to promote the business of which he carried the patrons of the same in the carriage in question free, and plaintiff was being so carried at the time of the accident, and the accident was caused either wholly by the negligence of the driver of said carriage, or partly by the negligence of said driver and partly by the negligence of the employes of the defendant, the plaintiff cannot recover in this action."

(2) "The plaintiff having entered a conveyance to be carried away from the depot in question, the defendant, and its servants and employes, had a right to suppose that the driver of such conveyance was familiar with the usual manner of backing the engine in question up to the train in question, and the usual perils and dangers incidental to crossing the track in question, and that he would exercise proper care to avoid collision while crossing said track."

Now, if you shall find, upon consideration of this case, that the defendant has been guilty of negligence, then the plaintiff is entitled to a verdict. The next question for you to consider is, what is the amount of damages which the plaintiff is entitled to recover?

Plaintiff is entitled to a reasonable compensation for injuries sustained,—a just remuneration for the injury. He is entitled to surgeon's fees, and amount paid for board and nursing, and a reasonable sum for pain and bodily suffering, and any permanent injury sustained. And, in arriving at such an amount, you can take into consideration the probabilities of life, and the fact that at the time of the injury he was receiving pay for his services as a traveling salesman; not that you must give him the amount he would receive, but you can take into consideration all these facts in arriving at a just compensation for the injury sustained.

I submit, gentlemen, this special finding, to which defendant's counsel desires an answer:

"Did the defendant use due care to avoid injury to the plaintiff after discovering his proximity to or presence upon the track in question."

Now, gentleman, I shall submit this case to you without further remark. It is one peculiarly of fact for a jury to determine, and the issue is a very simple one. We have consumed some little time in order to get at the facts in the case. I think you justly comprehend them, and will consider them as practical business men.

If you find for the plaintiff, you will say, "We, the jury, find for the plaintiff, and assess his damages at so much." If you find for the defendant, you will say, "We, the jury, find for the defendant."

It will be entered on the records that you find a verdict for the defendant, the Minneapolis & St. Louis Railway Company.

Jury found a verdict for plaintiff and assessed the damages at \$5,000.

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#### DEFENDANT'S REQUESTS.

(3) It appears from the evidence herein that the acts of negligence set forth in the complaint were not the proximate cause of the plaintiff's having been run over by the engine in question.

(Which request was duly refused by the court.)

(4) It not being alleged in the complaint that the plaintiff was upon the track in question at the time of the accident through any fault, or negligence or fault, of the defendants, or either of them, no evidence of any negligence, if any there be, occurring antecedent to the plaintiff being on the track after leaving the wagon will be considered.

(Which request was duly refused by the court.)

**THOMPSON, Adm'r, v. CHICAGO, M. & ST. P. RY. CO.**

(Circuit Court, D. Minnesota. January, 1883.)

**1. NEGLIGENCE—FELLOW-SERVANT—LIABILITY OF EMPLOYER.**

One who contracts to perform labor or render services for another, takes upon himself those risks and only such as are usually incident to the employment engaged in, and in the absence of statute the negligence of a fellow-servant is a risk assumed by the employe, and for which the employer is not liable.

**2. SAME—EMPLOYEE UNDER CONTROL OF ANOTHER.**

Where the employer places one employe under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable.

**3. SAME—DANGER KNOWN TO EMPLOYER OR HIS AGENT.**

If the employer or his authorized agent leads the employe to expose himself to a danger not ordinarily incident to the employment, which is known to the former and unknown to the latter, whereby the latter is injured, an action lies against the employer to recover damages for the injury.

**4. SAME—APPARENT OR KNOWN DANGER.**

If the danger is apparent, and is as well known to the employe as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond what it fairly imports, he is bound to inform the latter of such fact.

**5. SAME—CONTRIBUTORY NEGLIGENCE—RULE OF.**

The rule of contributory negligence applies to a case of this character, but with much less force than to a case where a servant is injured in the ordinary course of his employment, and not exposing himself to unusual dangers in obedience to the orders of his superiors.

**6. SAME—OBEDIENCE TO ORDERS OF SUPERIOR.**

The servant may obey the order of his superior and perform his duty, unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it, even under the orders of his employer.

**7. SAME—KNOWLEDGE OF DANGER—A QUESTION OF FACT.**

It is a question of fact for the jury whether, under the circumstances of the case, the party injured knew, or in the exercise of ordinary care and prudence might have known, that the danger was extraordinary.

*C. K. Davis and Colburn & Bassett, for plaintiff.*

*Bigelow, Flandrau & Squires, for defendant.*

McCRARY, C. J. This case is before the court on demurrer to the amended complaint. The action is to recover damages caused by the death of one Christian Olsen, who, according to the allegations of the amended complaint, was killed while in the employment of the defendant, acting under the orders of one Cavinaugh, who was the agent of the defendant, with authority to direct said Olsen in the performance of his duties. It is alleged that said Cavinaugh, in the exer-



cise of authority conferred upon him by the defendant, ordered the said Olsen into a place of unusual and extraordinary danger, by directing him to excavate earth from an embankment, where, by reason of the fact that a portion of the earth of the embankment was mixed with sand and fine gravel, it was liable to cave off, and fall upon and injure and kill the said Olsen; also, that the dangerous condition of said embankment was known to said Cavinaugh, who was, and for a long time had been, accustomed to and acquainted with such work, and the excavation of earth from said embankment and other similar embankments, and who was fully advised by personal inspection of the character of said bank and the excavation thereof; and who, nevertheless, failed in any way to notify or make known to said Olson the existence of such danger, or to take any measures whatever to guard against such danger; that said Olsen was not acquainted with such work, or with excavating from or working in or about the said embankment or similar embankments, and did not know the effects of such excavating, and did not know the liability and danger of the earth of such embankments, and especially of this embankment, to cave off and fall down; and that he believed and had reason to believe said bank of earth where he was at work under the orders of said Cavinaugh, as agent of the defendant, was safe and secure, and that he was in no danger of being killed or injured in any way while so working at said place; that said Cavinaugh, well knowing the danger, etc., ordered said Olsen to engage in excavating said embankment, and while so engaged he was killed by the falling of the earth upon him.

It may be useful to restate concisely the rules of law by which this and other similar cases are to be determined:

(1) Whoever contracts to perform labor or render services for another thereby takes upon himself such risks, and only such, as are usually incident to the employment in which he is to engage.

(2) In the absence of statute, the general rule is that the negligence of a fellow-servant is one of the risks assumed by the employe and for which the employer is not liable.

(3) But this general rule has its exceptions, one of which is that where the employer places one employe under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger and thus exposes him to extraordinary perils, of the existence and extent of which he is not advised, the master is liable. This for the reason that, in giving such an order, the superior servant stands in the place of the employer.

(4) If the employer or his authorized agent leads the employe to expose himself to a danger not ordinarily incident to the employment, which is

known to the former and unknown to the latter, whereby the latter is injured, an action may be maintained to recover damages for such injury.

(5) If the danger is apparent, and is as well known to the employe as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond that which it fairly imports, he is bound to inform the latter of such fact or put him in possession of such information.

(6) The rule respecting contributory negligence applies to a case of this character, but with much less force than to a case where the servant is injured in the ordinary course of his duties, and not while exposing himself to unusual dangers in obedience to the orders of his superior. As applied to cases such as this the rule is that the servant may obey the order of his superior and perform the duty, unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it even under the orders of his superior.

Applying these rules to the present case, it is apparent that the amended complaint states a cause of action, unless it can be said that it shows affirmatively that Olsen, at and before the time he was killed, was fully informed of the peril to himself of the services in which he was engaged. The contrary is distinctly averred, and I do not think the court can say, as a matter of law, that in this respect the allegations of the amended complaint are necessarily untrue. It is a question of fact to be left to the jury, whether under all the circumstances the said Olsen knew, or in the exercise of ordinary care and prudence might have known, that the danger was extraordinary. It is averred that Olsen was inexperienced in the business, and was not aware of the peril; and it may be that, upon consideration of all the facts and circumstances, a jury would be at liberty to find that such was the fact. It is true that, ordinarily, every person of mature years and common intelligence is bound to take notice of the law of gravitation, and is presumed to be aware of the danger that earth in an embankment, when undermined, will cave in and fall. But the amended complaint avers that the particular embankment at which Olsen was employed was peculiarly and unusually dangerous by reason of the character of the earth; and that this peculiar and extraordinary danger was known to Cavinaugh, and was not communicated to Olsen. These allegations being admitted by the demurrer, I am of the opinion that a question is presented for the consideration of a jury, and that, therefore, the demurrer must be overruled; and it is so ordered.

The following authorities bear with more or less directness upon the questions presented by this demurrer. *Baxter v. Roberts*, 13 Amer. Law Reg. 41, and note; *Holden v. Fitchburg R. Co.* 37 Amer. Rep.

343; *L. S. Iron Co. v. Ericson*, 18 Amer. Law Reg. 28; *Miller v. U. P. R. Co.* 12 FED. REP. 600; *Dillon v. U. P. R. Co.* 3 Dill. 319; *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 661; [S. C. 11 N. W. Rep. 24;] *Davis v. R. Co.* 20 Mich. 105, 127.

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DELGER v. CITY OF ST. PAUL.

(Circuit Court, D. Minnesota. December, 1882.)

1. MUNICIPAL CORPORATION—NEGLIGENCE—FAILURE TO KEEP SIDEWALKS IN REPAIR.

A municipality having, by its charter and by-laws, charge of the streets and sidewalks, with power to compel by assessment repairs to the same, is bound to keep them in good and safe condition, and will be liable for damages to a person who, without negligence on his part, is damaged by reason of its failure to so repair, provided the city authorities knew the existence of the cause of the injury, or were informed of it, or such a state of circumstances is disclosed that notice would be implied.

2. BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE TO DEFEAT RECOVERY.

The burden of proof is with the plaintiff to establish negligence. If the plaintiff materially contributed to the injuries by her own negligence, she cannot recover. The law in such cases is well settled, and the question is purely one of facts for the jury.

NELSON, D. J. The plaintiff brings suit against the city of St. Paul to recover damages for an injury resulting, as she claims, from the negligence of the corporate authorities of the city in permitting a pit or hole to remain open, partly on the street and partly on the sidewalk, into which she fell in the evening while passing from the bridge over this sidewalk leading up a public street in the Sixth ward. The facts are in evidence before you. The city claims the evidence shows that it exercised all the care and caution necessary to make this sidewalk and street safe; that the opening was filled up so that it was sufficient for the purpose for which it was used; and that no negligence of the city authorities is proved. The burden of proof is upon the plaintiff to establish negligence before she can recover. She must show that the city failed to exercise the care and caution required to put this sidewalk in safe condition. The law is well settled, and there is no controversy between the parties upon the legal duties of the city, and the care and caution required of the plaintiff. It is this as applied to the case: The municipality of St. Paul, by its charter and by-laws, has charge and control of the streets and sidewalks. It can open and authorize the grade of streets, and the

construction and repair of sidewalks. By its charter it is furnished with power to compel by assessments the repair of the public streets and sidewalks within the corporate limits, and is required and bound to keep them in good and safe condition. If an opening was left in the street or sidewalk, and the plaintiff, coming along in the evening, when dark, falls into such opening or hole without negligence on her part,—that is, without the want of such care and caution as the circumstances require,—and is thereby injured, the city is liable for the damages sustained by the injury thus inflicted; provided the city authorities knew of the existence of the cause of the injury, or were informed of it, or such a state of circumstances is disclosed by the evidence that notice would be implied.

If the plaintiff has been guilty of negligence on her part, which materially contributed to the injury sustained, then she cannot recover. The municipal government would not be liable for an injury which was the result of her own misfortune. This is peculiarly a question of fact, and you will apply the law laid down by the court to this case.

The city authorities, when they had notice of this pit-hole, this dangerous place, would have a reasonable time to repair it, and they claim it was in process of being repaired, and was put in such condition that it was ordinarily safe for passengers. That is for you to determine. If they were repairing it, and it was put in ordinarily safe condition, and no warning was given or light placed to indicate there was any such dangerous hole, the city cannot be excused from liability if the injury happened through such negligence solely. That is the law, and if you find in this case the city was not guilty of negligence, your verdict must be for the defendant. If you find the city was guilty of negligence, and that the plaintiff in this case exercised due care, and has not contributed by her own negligence to the injury sustained, then you will consider the amount of damages which she is entitled to recover. The rule is this: she is entitled to recover actual expenses, including medical attendance, if any has been proven; if not, then you are to give her such reasonable amount as you think will compensate her for the injury sustained. If any permanent injury is proven, you must award such compensation as you think will remunerate her for that, and also for any mental and bodily distress.

Verdict for plaintiff.

## THREE PACKAGES OF DISTILLED SPIRITS.

(District Court, S. D. New York. December 20, 1882.)

## FORFEITURE—LIQUORS—STAMPS.

Where packages containing liquors have once been properly stamped and marked, and the proper duties paid thereon, and after a sale by a retail dealer of a portion of the contents the residue is diluted with water only, and still remains in the original packages, *held*, that such liquors are not liable to forfeiture, under section 3289 of the Revised Statutes, as "not having thereon each mark and stamp required therefor."

*S. L. Woodford and E. B. Hill*, for the United States.

*A. J. Dittenhoefer*, for claimant.

BROWN, D. J. This case was tried before me without a jury, by the consent of the parties, the following facts being admitted:

That the three packages of spirits seized had originally been properly stamped, and still remained in the original packages; that after a part had been drawn off and sold by the claimant, under a due license, he diluted what remained by addition of water to the casks, thus reducing the proof of the spirits. Being found in this condition, and showing a lower proof than the stamps upon the casks would indicate, they were seized by the United States officers for forfeiture, under section 3289 of the Revised Statutes, as not "having thereon each mark and stamp required therefor."

The sole question presented is, therefore, whether the mere addition of water, by a retail dealer, to a cask of spirits on which the United States duties have been once fully paid and properly stamped, renders them liable to forfeiture.

A case somewhat similar was tried before the late Judge SWING, in *U. S. v. Thirty-two Barrels, etc.*, 5 FED. REP. 188, in which he charged the jury "that the mere addition of water would not bring the party within the inhibition of the statute."

It is claimed on the part of the government that the various sections providing for stamps, which, under the regulations of the treasury department, must be in accord with the proof of the spirits, are designed to afford continuous means of identification of the spirits so long as any remains in the same cask, and thereby aid in the detection of frauds, and that this purpose would be defeated if the addition of water to a half empty cask were held to be legal; and that if liquors could be sold from casks not corresponding, as to their proof, with the original stamps, there would be no means of preventing further frauds by retail dealers, who, by putting into half emptied casks, first, water, and afterwards, as occasion might serve, spirits, upon which no duty at all had been paid, might thus baffle detection.

The argument is ingenious, but goes further, it seems to me, than the court is warranted in a construction of penal statutes. The addition of spirits on which no duty had been paid to a cask partly empty, would be an undoubted act of fraud, and is severely punishable under section 3326. The mere addition of water, however, is not a fraud,—at least, not upon the government; and upon the facts admitted in this case there has been no fraud, and no injury to the United States. It would be, it seems to me, a violation of the uniform rule requiring a strict construction of penal statutes, to hold that this unprohibited act, which it is conceded worked no injury to the government, should entail a forfeiture.

The suggestion that the stamp upon the cask must at all times correspond with the proof of the spirits within, as a means of identification, under pain of forfeiture, is argumentative only, and is not warranted by the statute. The law does not even require the proof to be specified or indicated by the stamp; and in the case above cited it was shown that the proof changes with age, so that packages rightly stamped originally would not, if long kept, exhibit a proof corresponding with the stamps. But, aside from this consideration, I think that section 3289 refers only to spirits on which the full and proper duties have never been paid, or proper stamps affixed. Its object is to secure to the government its dues, and to punish by forfeiture any dealings in spirits which are insufficiently stamped; not to forfeit spirits on which all the government claims have once been satisfied, nor to forfeit spirits on which the stamps appear to be more than were necessary. When the package has once had the proper marks and stamps affixed upon it, the requirements of that section are satisfied so long as no new spirits are put into the same package, and the stamps and package remain unchanged. If a wide divergence is found between the stamps and the spirit proof of the contents of the package, doubtless a presumption of some irregularity or fraud arises, which the dealer must explain; but when he has shown, as is admitted in this case, that the spirits remain in the original cask, that the duty has been fully paid, and that no different spirits have ever been put into it, but water only, I think he has shown that the original stamp is, in the language of section 3289, "the proper stamp and mark" for that cask and for those liquors, although since diluted with water.

The court is not authorized to give a broad and loose construction to a penal statute, so as to work a forfeiture, where no fraud or injury to the government is involved, merely that the government officers may be aided in the detection of frauds by other persons in other cases.

Had congress so intended, or had it designed that the stamp should not only indicate the proof when stamped, but continue to do so at all times subsequent, under pain of forfeiture, that intention would have been more plainly indicated in the express terms of the statute, and not left to rest merely upon ingenious argument and doubtful construction. The defendant should have judgment.

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WELLING and another v. CRANE and others.

(Circuit Court, D. New Jersey. December 21, 1882.)

PATENTS FOR INVENTIONS—NEW COMBINATIONS.

Any new combination of old ingredients is patentable when any new useful results follow; but the mere exercise of judgment or mechanical skill in selecting a few ingredients from a larger number already known and specified in prior patents, is not an invention.

In Equity.

*Betts, Atterbury & Betts*, for complainants.

*J. H. Ackerman and Rowland Cox*, for defendants.

NIXON, D. J. This action is brought to restrain the defendants from infringing letters patent No. 98,727, issued to William M. Welling, and bearing date January 1, 1870. The title of the patent declares it to be an improved composition, resembling horn. The specification states that a composition had heretofore been made resembling ivory, in which the ingredients were mixed together and then ground between heated rollers to render the composition uniform and plastic, and then recites three several patents which had previously been granted to Welling,—the first numbered 17,949, and dated August 4, 1857; the second numbered 75,067, and dated March 3, 1868; and the third numbered 89,100, and dated April 20, 1869,—all obtained for an improvement of compositions imitating ivory. He claims that the present invention is an improvement upon these patents, and has reference to a new composition to be worked and moulded the same as set forth therein. The defense turns chiefly upon the question of the novelty of the complainants' patent. Two inquiries are presented: (1) What is the invention which the patentee claims? and (2) was it known to the public at the time of Welling's application for the patent?

1. The first of these questions is not readily answered. The patentee himself, although pressed strongly under cross-examination,

did not seem willing to tell us what he deemed his invention to be. The patent was issued under the act of July 4, 1836, the sixth section of which provides—

That before any inventor shall receive a patent he shall deliver a written description of his invention or discovery in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, compound, and use the same; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention."

The patentee was requested by the solicitor of the defendants to point out the particular statements in the patent which described his invention, (Complainants' Record, p. 152; cross-question 477 *et seq.*) but he declined to do so, saying that his only answer was the patent itself, and the testimony taken in the case. The complainant's expert, Mr. Brevoort, was more communicative, and, in reply to a question as to what he understood was claimed and described in the patent, states, (Complainants' Record:)

"The claim I understand to be for an article of manufacture consisting of the composition described in the patent, which composition is to be prepared by the process described in the patent; that is to say, the patent is for an article of manufacture prepared by a certain process. The article is to consist, according to the patent, of shellac, fiber in the form of flock, and, if desired, of pigments, to give to the article the desired color, and to impart to the article the desired gravity. The patent also specifies that, by weight, one part of shellac and a half part of the flock material are to be used. The amount of pigment which may be used is not stated. The process consists in mixing the ingredients together in a dry state. The composition, when mixed together, is then to be worked and ground between rollers, in the presence of sufficient heat to render the mass plastic. After this the mass may be moulded to form any desired article. \* \* \* To sum up the matter briefly, I would state that I understand the claim of the Welling patent to cover an article made from flock and shellac in about the proportions given, and to which coloring may be added, when said article is produced, by mixing the ingredients together in the dry state, grinding them, in the presence of heat, between rolls, so that the mass is plastic, and then moulding the mass in the desired form."

This would seem to be definite enough. Are the methods for making such an article sufficiently described in the specifications of the patent? The patentee says he has a new composition, resembling horn, which is an improvement upon all compositions before made. In manufacturing it, he uses shellac and vegetable or animal fiber, mixed together by well-known means—taking "about one part, by weight, of shellac, to one-half part, by weight, of cotton, wool, or other animal or vegetable fiber." He finds that it is best to mix the in-



redients together in a dry state, the fiber being in short pieces or in the form of flock, and according to the fineness of the fiber and the extent to which they are ground together, so the materials formed from such a composition will be more or less mottled in appearance, similar to horn, and various colors may be produced by the color previously given to the fibrous material. Different pigments may be mixed in the composition to give the desired color, or to impart more or less weight, as desired. The chief characteristic of the new composition is its great strength.

In the testimony taken, in the disclaimer filed by the complainants *pendente lite*, and in the arguments of counsel, an attempt has been made to limit the construction of these specifications to an article formed from the mixture of shellac with cotton flock in the proportions named in the patent. The reason of such an attempt is obvious. If it fairly includes in the materials to be used all animal or vegetable fibers, the patent must be declared void for claiming too much. It is doubtful whether the specifications, properly construed, are capable of such limitations; but the question is not important, if it shall be found, upon investigation of the state of the art at the time of the issue of the patent, that there is no novelty in the alleged invention when the fibrous material used is confined to flock.

2. What did the public know in regard to the subject-matter at the time the Welling patent was issued?

It knew that as early as October 3, 1854, one Samuel Peck, of Connecticut, obtained letters patent No. 11,758, for improvement in the manufacture of a composition for daguerreotype cases, and that in the specifications of the patent it was stated that the composition to which the invention related was composed of gum shellac, and woody fibers or other suitable fibrous material, dyed to the color that might be required and ground with the shellac and between hot rollers, so as to be converted into a mass, which, when heated, became plastic, so that it could be pressed into a mould or between dies, and made to take the form that might be imparted to it by such dies.

It knew that one John Smith, of Birmingham, England, procured English letters patent, on April 5, 1860, for an improvement in a composition for the manufacture of buttons and other dress fastenings, the object of the patentee being to attain greater tenacity, density, lightness, and delicacy of tint in coloring. He states that he takes one pound of shellac, dissolves it by heat on a flat iron slab, and then mixes with it an equal quantity, by bulk, of ebony dust, or other wood dust; that he then introduces coloring matter, and amalga-

mates the ingredients until the mass appears thoroughly homogeneous in its nature throughout. These components having been well mixed upon a slab or stone, while the lac is in a plastic state and under heat, the composition is then to be placed in sufficient quantities in dies of any description, prepared and designed for the forms of the article to be produced. The patentee then suggests that in cases in which it may be desirable that the composition should possess greater density of material, such density may be obtained by the addition of mineral substances, the proportions of which must be governed by the requirements of the case; and when greater tenacity may be desired, that quality may also be obtained by the admixture of a due proportion of vegetable fiber other than wood dust; as, for instance, the shearings of cottons, velveteens, or hemp, flax, or other such like materials.

It also knew that Charles Westendarp, Jr., of London, on the ninth of December, 1857, obtained letters patent for the manufacture of a material which he called "artificial ivory." He says that his invention consisted in manufacturing a material which should be made to imitate ivory, bone, horn, coral, or other similar substances, natural or artificial, and which may be used in preference to ivory on account of cheapness and adaptability for billiard balls, knobs, finger plates, piano-forte keys, rulers, paper knives, etc. He states, in the specifications of his patent, that he takes any certain quantity of small particles of ivory, bone, wood, glass, cotton, wool, or other similar articles, either in a coarse or fine powder, or in shavings, according to the imitations intended, and combines them, or any of them, or all of them, or as many of them as he sees fit, according to the purpose required, with gums or other resinous materials, such as gum copal, gum shellac, resin, wax, or other glutinous or resinous materials; also using which of the said gums he sees fit, for the purpose the materials are required for,—either the whole of the said gums, or part or any of them. In giving a precise description of the manufacture of artificial ivory he considers that it will be sufficient to explain the method of making white billiard balls, as the various articles admit of such trifling variations that every one skilled in any handicraft can easily reproduce them. One of the methods he states as follows: The same purpose is effected by reducing eight ounces of white shellac, three ounces of white color, prepared of bismuth, lead, or zinc, with five ounces of ivory dust, bone dust, or any other suitable matter, into a fine powder, and by mixing this powder, in passing it between heated metal rollers repeatedly at about 230 deg

to 280 deg. Fahrenheit. By this process a soft homogeneous mass is obtained, which can easily be moulded into any desired shape, and forms, when cold or hard, a very ivory-like material. Instead of using ivory dust, steamed and finely-powdered bones, porcelain, cotton, and various finely-powdered materials may be employed, and the colors may be varied, according to the tint or shade required; the ivory or other dust may be dyed, similar to cotton cloth.

It may be gathered, from the foregoing reference to patents antedating and anticipating the complainants' patent, that there is no novelty in the alleged invention of Welling, unless it is novel and patentable to select two or three from the large number of alternative ingredients, any of which Westendarp says may be used in the manufacture of artificial ivory. The complainants insist that such selection indicates invention or discovery, because Westendarp nowhere suggests that the use of cotton in a finely-powdered state, in forming the new composition, will produce any better result than ivory dust, bone dust, or powdered porcelain, and because it required experiment to ascertain the fact of its superiority.

We have, then, this question presented: One patentee names a number of ingredients from which an article may be mechanically formed, useful for commercial purposes; another, from this number, selects two or three which he claims will produce the best result if used under prescribed conditions, and amalgamated in certain proportions. The conditions are that the ingredients shall be mixed together in a dry state, the fiber being in short pieces, or in the form of flock; and the proportions are about one part, by weight, of shellac, to one-half part, by weight, of cotton, wool, or other animal or vegetable fiber.

Any one familiar with the state of the art when the patent was issued will at once perceive that there is nothing new in any of these instrumentalities or suggestions. The combination of shellac with animal or vegetable fiber—the ingredients being in a dry state—had long been practiced; the use of rollers in amalgamating the compound long known; cotton, with its fiber in short pieces or in the form of flock, is only another statement for cotton in a fine powder. The proportions indicated are substantially the same as those of Smith in bulk, or those of Westendarp in weight, in his description of the manufacture of artificial ivory to be used in making billiard balls.

Any new combination of old ingredients is, doubtless, patentable, when any new useful results follow. But what new useful results took place in this case? It is not pretended that any chemical

changes are affected by the admixture of the ingredients according to the proportions of the complainants' patent. They are mechanical merely, and it was certainly known, long before Welling suggested it, that the use of more or less cotton flock or finely-powdered cotton, as a binding agent, added more or less tenacity or strength to the compound.

It is a fact, which ought not to be overlooked, that the specifications of the Welling patent give no hint to the public that, in using the patent, any better material can be obtained from the cotton than the wool, although the proofs show that at the time of applying for the patent the alleged inventor knew of the great superiority of the cotton as a binding agent in the composition. He keeps that secret in his own breast, and leaves the matter to be ascertained by experiments, as Westendarp left it. Indeed, we do not think it is too much to affirm that the only advantage which the public gained from the specifications and claim of the complainants' patent was that Welling made a selection of a few ingredients from the larger number of Westendarp, from which materials might be chosen to experiment with, and we do not think that such an exercise of judgment or mechanical skill should be dignified with the name of invention. Not finding any patentable novelty in the complainants' patent, the bill must be dismissed, with costs.

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Goss and others *v.* CAMERON and others.

(Circuit Court, N. D. Illinois. December 4, 1882.)

PATENTS FOR INVENTIONS.

In a suit for an infringement of a patent for an improvement in feeding attachments of printing machines, where the first claim was for the method and not for the result of printing or shading illuminated cards diagonally, and the second claim is for a combination of old and well-known parts of a cylinder chromatic printing-press and the nippers, *held*, that the patent is not infringed by defendants' devising a new and useful mode of printing those blended colors diagonally across the card, instead of printing them in bars parallel to the sides or ends of the card, where they do not use all complainants' combination, and where they do their work on a chromatic press without making any substantial changes in its mechanism.

*E. T. Warner and H. Harrison*, for complainants.

*West & Bond*, for defendants.

BLODGETT, D. J. This is a suit to enjoin infringement of patent No. 229,998, issued July 13, 1880, to complainants for "improve-

ments in feeding attachments for printing-presses," and for an accounting. In their specifications the inventors say:

"The object of the invention is to provide means for printing illuminated matter in such manner that the stripes or bars of color shall extend diagonally across the card or sheet printed upon, and to that end the invention consists in feeding the cards or sheets in a novel manner, and in arranging the form correspondingly."

The diagonal color printing in question is accomplished by placing the form diagonally upon the bed or platen of the printing-press at whatever angle it may be wished to have the stripes or bars of color run across the face of the sheet to be printed, and then feeding the sheets to be printed onto the cylinder diagonally, so that they will register with the form, and the diagonal feeding of the sheets is secured by so arranging the nippers that they will seize and hold the sheet by one corner, instead of the edge or end, as is done in square printing. To make the nippers perform the function of holding the sheet by the corner, two longer nippers than those adapted to square printing are placed upon the nipper shaft, and so arranged that they will seize upon the corner of the sheet in such a way as not to interfere with the portion of the sheet to be printed or colored; that is, they are only to take hold of the corner and edges of the sheet.

The claims of the patent, which it is insisted defendants infringe, are as follows:

"(1) The method, substantially as hereinabove described, of printing or shading illuminated cards or sheets diagonally, and by feeding the cards or sheets diagonally into the press by arranging the form in a correspondingly diagonal position, as specified (2) The combination with the feed-board and impression cylinder of the printing-press of the nippers, *f, f*, each successively longer than the others, and having their working ends in a line extending diagonally across the cylinder, and of the extensible vibratory guides, *g, g*, whereby the sheets or cards feeding diagonally into the press will be seized and guided substantially as and for the purpose specified."

The patent contains a third claim, but it is not pretended that defendants infringe this last claim, as it is for a combination of the tilting feed-board, described in the specifications, with other parts of the mechanism.

As to the first claim, which is broadly for the method of printing or shading illuminated cards diagonally, by feeding the sheets diagonally into the press and by arranging the form in a corresponding diagonal position, it can only be construed to cover the result described when obtained by the instrumentalities shown; or, in other

words, in order to infringe this claim the work must be done in substantially the same manner, and by substantially the same mechanism, as shown in complainants' patent; if other mechanism is used, or more or less of the mechanism which is shown by the complainants is used to accomplish this result, then there is no infringement of this claim. The only ground upon which this claim can be sustained at all is that it is a claim for diagonal printing, to be accomplished by the means shown, and not for diagonal printing as a result, nor can it be held to cover a mere mode of working or manipulating a common printing-press when no material changes are made in its mechanism, and only the working position of one or more of its movable parts is changed.

The second claim is for a combination of old and well-known parts of a cylinder chromatic printing-press and the nippers, "each successively longer than the other, with their working ends in a line diagonally across the cylinder" and the vibratory guides, and no one can be charged with infringement of this patent unless he uses the whole combination, or known substitutes therefor. The defendants do not use the vibratory guides which form a part of complainants' combination, nor any substitute therefor; but adjust their sheets diagonally upon the feeding-board, and deliver them to the cylinder corner ways, by the aid of pins fixed in the feeding-board, by means of which the sheet is delivered upon the cylinder at the proper angle, to correspond with the angle at which the form is placed upon the bed of the press. The defendants also use long and short nippers, so arranged as to form a V, corresponding nearly to the shape of the corners of the sheet to be taken hold of.

The proof also shows that diagonal printing, either in several colors or one color, is not new to the printing art, and also that pins upon the feeding-board, as a means of obtaining such an adjustment of the sheet on the board as will secure its delivery on the cylinder at the proper angle or position, to correspond to the form on which it is to be printed, was old and well known long before this patent was obtained. The proof showing that defendants have only used pins as the means for arranging their sheets upon the feeding-board, and that they do not use the guides described by the complainants, I am of opinion they do not infringe either of the claims of the patent, because their pins are not the equivalent of the complainants' guides, but are such devices for arranging the sheets upon the feeding-board as were well known to printers long before this inventor entered the field. It is true, defendants use nippers which correspond in their

function and effect to those described in complainants' patent; but the defendants' nippers are not arranged "each successively longer than the others, and with their working ends in a line extending diagonally across the cylinder," but they are arranged so that their working ends form a triangle or V. It is also true that defendants did not remove the guides from their press, but simply turned them back upon the shaft. This, however, is equivalent to a removal of the guides, as they performed no part in the work of holding or adjusting the sheets.

I may add that I see nothing in what the defendants have done more than the mere mechanical adaptation of their machine to a peculiar kind of work which did not require invention. Their press with its working appliances, such as the nippers and feed-board, was arranged to do square printing. They could arrange a form in the bed of the press so that it could be printed lengthways or crosswise, and must feed the sheets into the press so as to correspond with the form. If it became desirable or fashionable to print in colors diagonally, it was obvious, it seems to me, to any mechanic or man of ordinary mechanical skill accustomed to the working of such a printing-press, that in order to print diagonally all he had to do was to place his form at the required angle on the bed of the press and feed the sheets so that they would be delivered by the cylinder upon the form at the same angle with the form. To do this more surely, defendants changed the nippers so that they would grasp the corner of the sheet, and placed the sheet at the proper angle on the feeding-board by the aid of pins. Penciled or inked lines might probably be used for the same purpose, although it would require a more expert feeder to do the work. So, too, the ordinary nippers used for square work may be used by the defendants' process, as was demonstrated by some actual work done in the presence of the counsel and myself on a visit to the defendants' press-room, although it is probable they would not always secure so perfect a register with the short nippers, as with nippers arranged in V shape.

I cannot, therefore, see in what defendants have done anything more than one of those allowable mechanical changes which any skilled manipulator of a printing press, familiar with its capacities for doing various kinds of work, may make to adapt his machine to his work. The art of printing in blended colors has been greatly cheapened by late inventions pertaining to the chromatic press, with which complainants' invention has nothing to do. The only claim of these inventors is that they have devised a new and useful mode

of printing those blended colors diagonally across the card, instead of printing them in bars parallel to the sides or ends of the card, and I only intend to be understood as holding in this case that defendants do not infringe, because they do not use all the complainants' combination, and because they do their work on a chromatic press, without making any substantial changes in its mechanism. The bill is therefore dismissed for want of equity, on the ground that I find that there is no infringement of complainants' patent.

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### THE ARENDAL. (Two Cases.)\*

(District Court, E. D. Pennsylvania. December 1, 1882.)

#### 1. SALVAGE—DERELICT.

Where a sailing vessel was obliged to anchor several miles off shore, to hold against the current and ice coming down Delaware bay, and the crew sought safety by getting ashore in small boats, leaving the vessel in an unsafe position, intending to return with a tug, and engaged to assist a vessel with a wrecking crew, who, being unable to put their own tugs through the ice, obtained a city ice-boat, owned and used by the city for the purpose of breaking up ice, keeping the channel open, and also performing towage service for pay, and they took the vessel in tow, picked up her crew on their return, and succeeded with difficulty in getting the vessel into the port of Philadelphia several days afterwards, the facts do not make a case of technical derelict, but all who participated in the rescue must be regarded as salvors.

#### 2. PUBLIC VESSELS—CITY ICE-BOAT—DUTY OF.

A city ice-boat, owned and used by the city for the purpose of breaking up ice, keeping the channel open, and performing towage service for pay, is under no more obligation to rescue a wrecked or disabled vessel than other vessels equally competent and similarly situated; if, however, the master was more intent upon making salvage than discharging his first duty of keeping navigation open, this fact should be considered, and he should be rewarded accordingly, or not at all.

#### 3. RATE OF COMPENSATION.

The sum allowed for salvage service should be sufficient to cover the expense, time, labor, skill, risk to property and person, and to reward fully the enterprise displayed. In this case, (value of ice-boat being \$245,000, having a crew of 30, the wreckers having 8 or 10 men, the value of the bark, cargo, and freight being about \$28,600,) the circumstances of the case do not call for a large award, or any given proportion of the property saved; \$2,500 is sufficient.

#### 4. DISTRIBUTION AMONG LIBELANTS.

Distribution will be referred to a commissioner, who may take further testimony of the conduct of the master of the ice-boat, if it be deemed necessary, and the subject be considered in the distribution.

\*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.



### In Admiralty.

Libel filed by Henry F. Virden, master of City Ice-boat No. 3, on behalf of himself as master, and of the city of Philadelphia as owner, and of the crew of said boat, consisting of 30 men, against the bark Arendal, setting forth that on the fourth day of February, 1881, the boat, with an additional crew of eight or ten wreckers, proceeded to search for the bark Arendal, reported to have been abandoned in the ice fields off the Delaware capes, and after great difficulty found the bark at 1 o'clock p. m. in a dangerous position, 15 miles from Cape Henlopen and 5 miles off shore, hard fast in the ice, drifting seaward, and at a distance of 10 miles from the place where she had been abandoned; that proceeding with great difficulty the bark was towed into harbor at breakwater, at 11 o'clock p. m. of the same day, and afterwards the boat picked up the crew of the bark, who had come from the life-saving station near Indian river, and continued with her tow through the ice, reaching Walnut street, Philadelphia, at 3 p. m., February 8, 1881; that the ice-boat was built by the city of Philadelphia costing \$245,000, and was not constructed for the character of service performed, and the value of the bark, her cargo, and freight is \$28,600. Wherefore the libelants claimed to be entitled to salvage. Also a libel filed by E. J. Morris for E. J. Morris & Co., wreckers, setting forth that on the third day of February, 1881, libelants contracted with the master of the bark, which was then outside Rehobeth beach, leaking and nearly cut through with ice, to get the bark and tow her into the breakwater, and to stay by and deliver her to the port of Philadelphia, compensation therefor to be left to the board of marine underwriters of Philadelphia; that the libelants were unable, on account of the ice, to use their tugs North America and Pioneer, and therefore procured the City Ice-boat No. 3, and with eight or ten of their own men proceeded in her, under the command of her captain, to the bark, and finally with danger and difficulty towed the bark into Philadelphia. Wherefore the libelants claim salvage to be awarded, since the city ice-boat had filed a libel, and the compensation could not, therefore, be determined by the board of underwriters.

The respondents, in answer to both libels, claimed that the bark had not been abandoned; that Morris & Co. had failed to perform their contract, but assisted and acted under the command of the city ice-boat, whose master acted badly in refusing to pick up the crew of her bark, while attempting to return, and in not taking them up until after the bark was in tow, and also in persisting in charge of

the tow after her crew had declined their assistance, and contended that towage services only had been rendered, for which the regular rate would be less than \$250, while \$500 had been offered in settlement and refused; that the interests of commerce required that salvage should be refused to the city ice-boat, who acted without any contract with the trustees and in the line of its duty, being owned, equipped, and run by the city for the purpose of breaking the ice, keeping the channel clear, and performing towage services for pay, according to a schedule of rates adopted under a city ordinance, (West, Dig. 199,) which provided:

Sec. 2. "It shall be lawful hereafter for the trustees of the ice-boat to charge and collect such rates of towage for the services of the ice-boats under their care as they may deem best for the interests of the commerce of this port."

Sec. 3. "It shall be lawful for the trustees of the city ice-boat to allow the said boat to be used upon an occasion of imminent peril to any ship or vessel, for the relief of such ship or vessel, whether the same be needed in the Delaware river or bay, or on the adjacent coast: provided, the said boat shall always be first insured for a proper amount by the person for whose benefit she shall be so employed, and that the trustees make such charge for such use of said boat as they may deem adequate therefor."

*Wm. Nelson West and Wm. H. Addicks*, for ice-boat and city of Philadelphia.

A public vessel is entitled to salvage. *The Cybele*, 37 Law Times Rep. 165.

*Alfred Driver and J. Warren Coulston*, for the crew of the ice-boat.

*Theodore M. Etting and Henry R. Edmunds*, for Morris & Co.

The contract, not being for a sum certain, is no bar to a claim for salvage. *The A. D. Patchin*, 1 Blatchf. 414; *Adams v. Island City*, 1 Cliff. 216; *Coffin v. The Shaw*, Id. 235. The claim does not depend upon the status of other salvors. *The Blackwall*, 10 Wall. 1; *The Ewbank*, 1 Sumn. 416; *Adams v. Island City*, *supra*; *Norris v. Island City*, 1 Cliff. 219.

*Edward F. Pugh and Charles C. Lister*, for the Arendal.

Misbehavior bars claim for salvage. *The Choteau*, 9 FED. REP. 211. The bark was not a derelict. *The Hyderabad*, 11 FED. REP. 749; *The Cosmopolitan*, 6 Notes Cas. (Supp.) 17; *The Aquilla*, 1 C. Rob. 40. A public vessel, acting in the line of its duty, not entitled to salvage. 2 Parsons, Shipp. 273, note 6; 7 Op. Atty. Gen. 756; *The Choteau*, 9 FED. REP. 211; *Davey v. The Mary Frost*, 2 Woods, 306; *The Josephine*, 2 Blatchf. 322. The ice-boat may claim the

amount fixed by the schedule of rates for towage. *The Belle*, Edwards, 66; *Ex parte Cahoon*, 2 Mason, 87; *The Aquilla*, 1 C. Rob. 48; Conkl. Adm. Jur. 274. Or a mere remuneration. *The Thetis*, 3 Hagg. 14; *The Mary Ann*, Id. 158; *The Rapid*, Id. 154.

BUTLER, D. J. While the respondent was not, in my judgment, "derelict," (Conkl. Adm. 359, 360; *The Hyderabad*, 11 FED. REP. 749,) she was in very great distress and danger; and her rescue was a salvage service.

All who participated in the rescue must be regarded as salvors. The ice-boat and her crew owed the respondent no duty which required the services rendered. As appears by the original city ordinance on the subject, the ice-boats were established for the purpose of breaking up ice on the Delaware river, and keeping the channel open to navigation. This is the duty to which they are primarily devoted—for the performance of which no compensation can be demanded under any circumstances. Towage was a secondary consideration, not referred to in the original ordinance, and is performed under contract, for compensation, as by all other tugs, except that the rate of compensation, is generally established in advance by schedule. The boat was therefore under no greater obligation to rescue the respondent than any other vessel equally competent and similarly situated, would have been. She and her crew, as well as the wreckers taken on board, must, therefore, be treated as salvors. The city's ownership of the boat must, in view of the authorities, if not otherwise, be deemed unimportant.

What sum should be allowed? It should be sufficient to cover the expense, time, labor, skill, risk to property and person, incurred and expended, and to reward, fully, the enterprise displayed. The risk, skill and enterprise were not large. The time, labor, and cost—considering the value of the boat, and quantity of fuel consumed—were greater. The circumstances of the case do not call for a large award. There are few instances of salvage, in my judgment, considering the value of the property saved, where the sum should be materially less. Twenty-five hundred dollars is, I think, amply sufficient, and this sum is allowed. The libelants are not entitled to any given proportion of the property saved, but simply to compensation and reward according to the merit of their services and conduct.

I am not sure the conduct of the boat's master was in all respects commendable. It looks a little as if he was more intent upon making salvage than discharging the duty of keeping navigation open to vessels, less powerful than his own. This appearance may, however, be

dispelled by further investigation. The subject must be considered in distributing the sum awarded; and if the master's conduct is found to be such as here suspected, he should be rewarded accordingly, or not at all. In pursuance of the understanding between the libelants, the distribution will be referred to a commissioner, before whom further testimony respecting the master's conduct may be heard, if deemed necessary.

It is highly important that the officers of the ice-boats shall not allow their attention to be diverted from the important duty of keeping the channel open, by the temptation to seek prizes, elsewhere.

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### THE MARY.\*

(*District Court, E. D. Pennsylvania. November 20, 1882.*)

**1. TOWAGE—NEGLIGENCE—PROXIMATE CAUSE—BURDEN OF PROOF.**

In an action to recover damages for the loss of a barge three days after alleged negligent towage, the burden of proof rests upon the libelant to show that the alleged negligence was the proximate cause of the injury.

**2. TOWAGE CONTRACT CONSTRUED.**

Where a railroad company sold a ticket, stipulating that the tug Delaware would tow the libelant's barge to Smyrna, Delaware, and, by an arrangement with that tug, the tug Mary took the former's place, received the ticket, but with the libelant's consent towed the barge to the mouth of Smyrna creek, eight miles below the town, and three days afterwards the barge, while being poled up, grounded and was lost, the tug Mary is not liable for failure to tow up to the town.

In Admiralty. Hearing on libel and answer.

Libel filed by Michael Reilly, master of the barge Chihuahua, for damages occasioned by the loss of the barge, which, the libelant contended, had been taken in tow by the tug to be towed to the town of Smyrna, Delaware, but was abandoned in an unsafe place in Smyrna creek, eight miles from the destination, and while poling up grounded and became a total wreck. It appeared that an agent of the Philadelphia & Reading Railroad Company sold to libelant a ticket, stipulating that the tug Delaware would tow the barge to Smyrna, Delaware, and that by an arrangement with that tug and the Mary, the latter took her place, received the ticket, and towed the barge four miles up the creek at the first bridge, but eight miles from the town, and three days afterwards, while poling up the creek, the

\*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

barge grounded and was abandoned. The respondent claimed that her express agreement had been to tow merely to the mouth of the creek; that the injury was too remote, and in fact resulted from unskillful poling; and that a libel *in rem* was not the remedy for the non-feasance of a towage contract, which was the only cause of action libelant could have.

*Alfred Driver* and *J. Warren Coulston*, for libelant.

*Curtis Tilton* and *Henry Flanders*, for respondent.

BUTLER, D. J. The libelant's contract was with the Reading Railroad Company. The latter, having arranged with the tug Delaware for the towage of barges from Fairmount to the mouth of Smyrna creek, and other places, was in the habit of issuing towage tickets between the points; and in this instance issued one to *Smyrna*, for libelant. In pursuance of an understanding between the respondent and the tug Delaware, the former occasionally took the latter's place in towing vessels for the railroad company; and did so in this instance. While the ticket issued shows a contract by the company to tow the barge to Smyrna, there is evidence of a different understanding between the company's agent and the libelant. Whether the railroad company may be held to the terms shown by the ticket need not be considered. The respondent was not a party to this contract. Taking the Delaware's place in her arrangement with the railroad company, she became obliged to do what was thereby stipulated for, but no more. In this instance it became her duty to tow the libelant into the mouth of the creek; but unless it is shown that she, in some way, made herself a party to the railroad company's contract for towage to Smyrna, her duty ended there. This is not shown. Had she known the terms stated by the ticket, before entering upon the service, she should, probably, be held to an undertaking to comply with them. She did not, however, see the ticket, or become aware of its language, until near the mouth of the creek. Learning that the barge was loaded for Smyrna she informed the libelant that she would not take him there, and called his attention to the preparations necessary for getting up the creek alone. These preparations, in part at least, were made. The respondent nevertheless did tow the libelant up through the mouth of the creek, to the first bridge, a distance of several miles, and there cast off the lines and returned. Her duty was thus fully discharged.

The libelant's allegation that he requested to be taken to a wharf, near the bridge, and that he was left in an unsafe position, from which the wharf could not be reached without aid, is not, in my judgment

sustained. There is testimony that he requested to be taken to the wharf, but it is met by testimony to the contrary, to my mind, of greater weight. Aside from what the respondent's witnesses say on the subject, the probabilities are against the libelant. That he intended to pursue his way up the stream with the tide, can hardly be doubted. He had provided for doing so, in procuring a boat and anchor, and, as he doubtless believed at the time, a pilot familiar with the channel. As no motive whatever can be seen for refusing the alleged request, the inference is reasonable that it would not have been refused if made. Furthermore, it is not shown that the situation in which the libelant was left was dangerous, even if he proposed to go no further at the time.

Sufficient has been said to indicate the court's reasons for the decree. It would be out of place to inquire into the railroad company's liability under its contract, as shown by the ticket, or to enter upon the question whether the libelant's misfortune arose from failure to comply with the contract, or from fault of his own in neglecting to employ the pilot whose services were tendered, and attempting to pole his boat up a channel of which he was ignorant, or failing to seek the aid of the steam-barge, which passed him on the way. The libel must therefore be dismissed.

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### THE CLIFTON.

*(District Court, D. New Jersey. December 8, 1882.)*

#### 1. COLLISION—EIGHTEENTH SAILING RULE.

Where two vessels are approaching each other nearly end on, involving the risk of a collision, the eighteenth sailing rule requires that the helms of both vessels should be put to port so that each vessel should pass on the port side of the other, and the vessel failing to obey this rule will be held in fault in case of a collision.

#### 2. SAME—SIGNAL WHISTLE—PILOT REGULATIONS.

By the first rule of "the regulations for the government of pilots" it is prescribed that when steamers are approaching each other head and head, or nearly so, it shall be the duty of each steamer to pass to the right or on the port side of each other, and the pilot of either steamer may be first in determining to pursue this course, and shall give, as a signal of his intention, one short, distinct blast of his steam-whistle, which the pilot of the other steamer shall answer promptly by a similar blast, and if the answer be two blasts of the steam-whistle, in response to a single blast, such steamer will be held in fault in case of a collision.

In Admiralty.

*Bedle, Muirheid & McGee*, for libellant.

*Goodrich, Deady & Platt*, for claimants.

NIXON, D. J. This action is brought by the owners of the steam-tug Johnson Brothers against the steam-tug Clifton for damages arising from collision. The libel alleges that on the evening of the tenth of October, 1881, the tug-boat Johnson Brothers was steaming down the East river from Seventeenth street, New York city, bound for Jersey City; that said tug left Seventeenth street at 6:30 o'clock in the afternoon on a flood-tide; that shortly afterwards she discovered a tug-boat coming up the river in shore with a sloop in tow, and so shaped her course as to pass on the outward or eastern side of said tug and tow; that she then saw coming out from under her stern the tug-boat Clifton, showing a red light and a high white light. The Johnson Brothers immediately ported her helm and blew one whistle, and still seeing the red light of the Clifton and not hearing any answer to the whistle, put her helm hard a-port and again blew one long whistle, and the pilot rang four bells to stop, slow, and back said Johnson Brothers, which were at once obeyed. Upon the second whistle being blown the Clifton replied with two short whistles, and then swung around and showed both of her head-lights, and about five seconds afterwards struck the Johnson Brothers on the port bow, about four feet aft of her stem, and cut her about two-thirds in two, and left her in a sinking condition. The said collision occurred a few minutes after half-past 6 o'clock on the evening aforesaid, off Tenth street, in the East river, and on the New York side; that just previous to the collision, and immediately before putting her helm hard a-port, the Johnson Brothers was heading straight down the river; that it was not dark, but the weather was fair, and lights at the time could be plainly distinguished. It further alleged that at the time when the two vessels first came in sight of each other they were meeting end on, or nearly end on, so as to involve risk of collision, and that if the Clifton had put her helm a-port, or if she had kept her course, or if she had backed or taken any of the precautions to avoid a collision which the Johnson Brothers did, the collision would have been avoided. The answer of the respondents denies the statement of facts in the libel, and claims that on the evening in question the Clifton had landed near the south ferry in New York and was going up the river to Twelfth street for water, and was running pretty close along the piers on the New York side; that when off Fifth or Sixth street she sighted ahead the tug-boat Sarah with a schooner in tow on her starboard side; that when the Clifton got about off Ninth-

street pier she was close behind the schooner; that the Clifton, as soon as she passed Ninth street, hauled a little to port, intending to pass inside the schooner; that before the Clifton thus hauled in she had seen the green light and not the red light of the Johnson Brothers; that if the Johnson Brothers had kept her course she would have gone considerably to the starboard side of the Clifton, the said vessels being neither end on nor head to head, nor nearly so, but that just about the time the Clifton had hauled to port, after passing Ninth street, the Johnson Brothers gave one blast of her whistle, which was instantly answered by the Clifton with two blasts of her whistle; that thereupon the Johnson Brothers gave another single blast, which was also answered by the Clifton with two blasts, when suddenly and for the first time the red light of the Johnson Brothers came into view, and the engine of the Clifton was stopped and reversed, and her wheel hove hard a-starboard; but that almost immediately the collision occurred, the starboard bow of the Clifton and the port bow of the Johnson Brothers coming into violent collision.

After examination of the voluminous and contradictory testimony, I am of the opinion that the Clifton was in fault, and that the collision would not have occurred if those managing her had observed the rules of navigation applicable to the case. The two vessels were approaching each other nearly end on, involving the risk of coming together. The eighteenth sailing rule (section 4233, Rev. St.) requires, under such circumstances, that the helms of both vessels should be put to port, so that each vessel may pass on the port side of the other. The Johnson Brothers obeyed this rule, but the Clifton did not. Her pilot determined to pass the Sarah and her tow on the larboard or New York side, and in order to do this she starboarded her helm, although by so doing she was brought across the track of the Johnson Brothers, and came into collision with her. Besides, the Clifton was in fault in answering the single whistle of the Johnson Brothers with two whistles. By the first rule of "The regulations for the government of pilots, adopted by the board of supervising inspectors in June, 1871, and amended in January, 1875," it is prescribed that "when steamers are approaching each other head and head or nearly so, it shall be the duty of each steamer to pass to the right or on the port side of each other, and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give as a signal of his intention one short and distinct blast of his steam-whistle, which the pilot of the other steamer shall answer promptly by a sim-



ilar blast of his steam-whistle, and thereupon such steamer shall pass to the right or on the port side of each other." The pilot of the Johnson Brothers was the first to determine the course, and by one whistle gave notice to the Clifton to port her helm and pass to the right. But the pilot of the Clifton, wishing to go into the Twelfth-street dock by the shortest way, declined to accede to the arrangement, and replied with two whistles rather than one. It was as if he had said to the Johnson Brothers: "I hear your single whistle, but I give you notice, by returning two whistles, that I do not mean to comply with your request and go by you on your port side. I prefer to hug the wharves, and pass you on your starboard side, although the first rule or regulation, governing both of us, gives the pilot of either steamer the right of first determining on which side he will pass the other, and when he has given the notice of his determination by a single whistle, the other must accede by returning the same signal, and passing to the right, or on the port side of each other."

There must be a decree for the libelants, and a reference to ascertain the damages.

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### THE FERRERI.\*

(Circuit Court, E. D. New York. December 14, 1882.)

#### CONVERSION—JURISDICTION—CASE AFFIRMED.

Decision of the district court in the same case affirmed. See *The Ferreri*, 9 FED. REP. 468.

In Admiralty.

*W. W. Goodrich*, for libelants.

*Lorenzo Ullo*, for claimant.

BLATCHFORD, Justice. I have carefully examined the proofs in these cases, and considered the questions argued at the bar. The opinion of the district judge sets forth the facts correctly, and I concur in his conclusions, that the proofs show a right in the libelants to maintain a suit *in rem* against the vessel to recover the value of the resin; that, under the averments in the libel and its prayer, a decree for damages for conversion can be sustained; and that the libelants had a right to require the signing of the bill of lading which they demanded from the master. Whether they had a right to claim the benefit of the contract of shipment made by Michel with the vessel is

\*Reported by R. D. & Wyllys Benedict.

a question not necessary to be decided. The discussion of the facts and the law applicable to the case by the district judge is so full and thorough that nothing can be added to its force.

Decrees must be entered for the amounts of damages awarded below, with interest from September 27, 1881, with the costs taxed in favor of the libelants below, and their costs in this court, the bills of lading deposited to be returned on payment.

### THE JULIA L. SHERWOOD.\*

(District Court, E. D. New York. December 5, 1882.)

#### 1. VESSEL—LABOR AND MATERIALS SUPPLIED—LIEN UNDER STATE STATUTE.

The facts that a domestic vessel was placed upon a dry-dock for the purpose of being repaired, that she was there repaired, and had not left the place where the repairs were done up to the time of filing a libel against her by the owner of the dock for labor and material furnished, are sufficient to support a lien on the vessel therefor under the New York state statute.

#### 2. SAME—FILING SPECIFICATION OF LIEN.

The statute does not require the filing of a specification of lien, except in case the vessel departs from the port.

#### 3. STATUTORY LIEN—ENFORCEMENT IN ADMIRALTY.

*Semble*, that the facts proved in this case showed a lien enforceable in admiralty, aside from the provisions of the state statute.

#### In Admiralty.

*Tunis G. Bergen*, for libellant.

*S. B. Caldwell*, for claimant.

BENEDICT, D. J. The bill presented by the libellant, Theodore A. Crane, to the claimant and signed by him as correct, coupled with the positive evidence of a subsequent admission of its correctness by the claimant, affords abundant proof of the averments of the libel that the items of labor and material mentioned in the bill were supplied by the libellant to the boat upon the request of the owner. There is also proof in the case that such labor and material were necessary to the repair of the boat. The defense that this labor and material were furnished upon the sole personal credit of the owner of the boat, and to be paid for in four months, is not proved to my satisfaction. Neither has it been proved to my satisfaction that the work was performed under a contract to do it for a specific sum. The libellant is therefore entitled to a decree for the amount of the

\*Reported by R. D. & Wyllys Benedict.

bill, less \$25, proved to have been paid, provided the facts proved show a subsisting lien upon the boat therefor. The facts proved to support the liens are that the vessel was a domestic vessel; that she was placed upon the libelant's dry-dock in Brooklyn for the purpose of there being repaired; that she was there repaired, and, up to the time of filing the libel, had not left the place where the repairs were done. No evidence of the filing of a specification of lien has been given. These facts show a lien upon the vessel by virtue of the provisions of the statute of the state of New York.

I do not understand the statute to require the filing of a specification of the lien, except in case the vessel depart from the port. No adjudged case to the contrary of this has been referred to, and I suppose no such case exists. I therefore hold the existence of a lien created by the state law to have been proved.

It may be added that the fact set up in the answer as a defense, namely, that the libelant took the vessel into his custody for the purpose of repairing her, and continued to hold her in his possession until taken possession of by the marshal by virtue of process in this action, seems to bring the case within the authority of the case of *The B. F. Woolsey*, 7 FED. REP. 110, according to which decision the libelant has a lien enforceable in admiralty, aside from the provisions of the state statute upon which the libelant has relied.

Let a decree be entered in favor of the libelant for the sum of \$258.55, with interest from June 1, 1880, a costs.

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THE TIGER LILY.\*

(District Court, E. D. New York. November 14, 1882.)

1. NEGLIGENCE—PROOF OF DAMAGES.

On a reference to ascertain the amount of damages resulting from negligence, the libelant is bound to prove not only the injuries sustained, but also the amount of money necessary to repair such injuries; and an estimate including repairs not proved to have been made necessary by the accident, cannot be taken as proof of the amount of damages.

2. COSTS ALLOWED.

Where the libelant succeeded upon the issues, costs were allowed him, even though he recovered less than the amount claimed.

In Admiralty.

\*Reported by R. D. & Wyllys Benedict.

*Oscar Frisbie*, for libelant.

*Scudder & Carter*, for claimant.

BENEDICT, D. J. The evidence introduced to show the cost of repairing the injuries to the libelant's boat is the estimate of the carpenter, Marshal. This estimate included repairs not proved to have been made necessary by the accident in question, and cannot therefore be taken as proof of the amount of the libelant's damages. The libelant was bound not only to prove the injuries sustained, but also the amount of money necessary to repair such injuries, and he has failed to prove any greater amount than that allowed. The commissioner correctly limited his report to the sum of \$45, as the proof stands. The libelant's exceptions to the report are accordingly overruled.

The claimant's motion to be relieved from costs must be denied. The only ground for asking to be relieved from costs is that the libelant recovers less than the claimant offered to pay him before the institution of the suit. But no tender or offer to pay anything was made after the suit was commenced, and the case was strenuously contested upon the question of negligence. Upon that question the libelant recovers. There is not here a failure to succeed upon the principal questions put in controversy. In this case the libelant succeeds upon all the issues, but recovers less damages than he claimed. Moreover, to give him costs will do no injustice to the claimant, for the proofs indicate that the claimant's liability, limited as it is by this decision, will be less than it might have been under a different condition of the evidence.

Let a decree be entered for the amount reported due, with interest to date and costs.

See 11 FED. REP. 744.

## FARMERS' NAT. BANK OF PORTSMOUTH, O., v. HANNON, Adm'r, etc.\*

*(Circuit Court, S. D. Ohio, E. D. January 3, 1883.)*

## SUBROGATION—NECESSARY PARTIES.

Where certain stockholders of a corporation had entered into an agreement among themselves that they would "each be responsible in mutual degree for all paper negotiated by the agent of the company," and in case any paper of the company should be negotiated with the individual indorsement of one of the parties thereto, and be unprotected by the agent of the company, then they would be, "each and severally bound for the payment of such paper in mutual proportions;" and subsequently the corporation, by its agent, executed its promissory note to one of the parties to said agreement, by whom it was indorsed to another, who, in due course of trade, negotiated it, and no part of said note had been paid,—upon bill filed by the holder of such note against the administrator of one of the parties to said agreement, alleging the insolvency of the maker and indorsers of such note, and asking a decree for the entire amount thereof against defendant, *held*, that (1) as either of said indorsers could, if he had paid said note, have maintained an action against his co-contractors for their proportionate shares, the complainant was entitled to be subrogated to their rights; and (2) there was a defect of parties, the corporation, which was primarily liable for said note, and the defendant's intestate's co-obligors in said agreement, being necessary parties to a complete and final determination of the controversy.

In Equity. On demurrer.

*Coppock & Coppock and Stallo, Kittredge & Shoemaker*, for complainant.

*E. A. Guthrie*, for defendant.

BAXTER, C. J. It appears from complainant's bill that defendant's intestate was a shareholder in the Boone Mining & Manufacturing Company, a corporation organized under the laws of Kentucky, and that in order to enable said corporation to borrow money he entered into a contract with John Wynne, J. W. G. Stackpole, and other co-shareholders, as follows:

"CINCINNATI, February 21, 1871.

"We, the undersigned, shareholders of the capital stock of the Boone Mining & Manufacturing Company, hereby mutually agree with each other that they will each be responsible in mutual degree for all paper negotiated by the agent of the company for the use and benefit of the company; and should any paper be negotiated by the agent with the individual indorsement of one member, and be unprotected by the official agent by reason of a want of funds, then in such case the parties to this agreement shall be each and severally bound for

\*Reported by J. C. Harper, Esq., of the Cincinnati bar.

the payment of such paper in mutual proportions, and this agreement shall continue in force until the payment of all such claims have been made.

"J. H. GUTHRIE.

"J. E. WYNNE.

"M. F. THOMPSON.

"JOHN WYNNE.

"D. M. DAVIS.

"J. & C. REAKERT.

"J. W. G. STACKPOLE."

And afterwards, on the twenty-seventh of April, 1875, the corporation, by its authorized agent, executed its promissory note for \$5,328.22, payable four months from date to the order of said John Wynne, one of the parties to said contract, who indorsed it to Stackpole, by whom it was negotiated, in due course of trade, to the complainant. No part of this note has been paid. The complainant, alleging that the maker and the indorsers thereof are insolvent, prays for a decree for the amount thereof against the defendant as administrator of Guthrie. To this bill defendant has demurred, because, as he insists, it does not contain any equity whereon the court can ground any decree against defendant.

The several shareholders who entered into said contract of mutual indemnity were, as such, personally and pecuniarily interested in sustaining the credit and promoting the business of the corporation; and it was therefore that they severally undertook and mutually agreed to assume their several proportions of every liability that should thereafter be incurred by either of said parties under and pursuant to its provisions. And it is clear that if either of said indorsers had paid the debt demanded by the plaintiff in this suit, he could have maintained an action against his said co-contractors for the several amounts which they were, by the terms thereof, legally bound to contribute. If so, it follows that the complainant, being without remedy at law, is entitled to come into a court of equity for the purpose of having itself subrogated to their rights in the premises. But coming into equity it must adopt and pursue the peculiar methods appropriate to such tribunals. Before any decree can be made or relief given in a case like this, it must appear that all parties in interest are duly before the court, or a sufficient reason stated for omitting them. We think that there is a defect of parties in this case. The Boone Mining & Manufacturing Company, the maker of the note sued on, is primarily liable therefor.

It may have some valid defense to interpose. In the event the complainant succeeds in obtaining a decree against defendant, the

defendant would be entitled to a decree over against the principal debtor. The latter is therefore a necessary party to this suit, for the reasons—*First*, that it may make its defense, if it has any; and, *secondly*, to the end that if it has no defense, and a decree shall be rendered against the defendant herein, the latter may, without the expense and delay incident to the institution and prosecution of another and independent action, have his decree over against the corporation. We think, furthermore, that all the other parties to said agreement ought to be before the court. Complainant's claim is that defendant's intestate's estate is liable for its whole demand. We need not determine, at this time, how this is. It is for the present enough to say that such is complainant's contention. If the position is correct, each of the other parties to said agreement is in equity bound to contribute his proportionate part. Other equities may arise in the progress of the litigation for adjustment; but no such full and final adjustment could be decreed in their absence. The demurrer is therefore sustained. Complainant will be allowed 60 days in which to amend its bill and make new parties, or else show some good and sufficient reason for not doing so.

If such amendment shall not be made within the time allowed, complainants' bill will be dismissed with costs.

See *Farmers' Nat. Bank of Portsmouth, Ohio, v. Hannon, Adm'r, etc.*, 4 FED. REP. 612, where it was held that an action at law could not be maintained upon the contract set out in the opinion reported above.—[REP.]

## UNITED STATES v. DEEVER.

(District Court, W. D. North Carolina. 1882)

### 1. CRIMINAL LAW—EXTORTION—REV. ST. § 3169.

Extortion is the taking or obtaining of anything from another by a public officer by means of illegal compulsion or oppressive exaction. The offense of extortion, under subdivision 1, § 3169, of the Revised Statutes, is the same as the offense of extortion in the common law.

### 2. SAME—OPPRESSION.

Oppression is an act of cruelty, severity, unlawful exaction, domination, or use of excessive authority.

### 3. SAME—BY OFFICER.

To make an act oppressive on the part of an officer under the statute, it must be done willfully, "under color of law," and "without legal authority."

4. **SAME—MILITARY FORCE—AUTHORITY OF OFFICERS.**

Where an officer willfully and knowingly makes false representations to his superior officers as to the violent and lawless condition of the country, and thus induces his superior officers to send soldiers, which were unnecessary for the proper execution of the law, he is guilty of oppression. The law invests its officers with the necessary power to execute its mandates, and affords them protection while properly performing official duties.

5. **SAME—ACTS WITHOUT AUTHORITY OF LAW.**

The destruction of a still by a revenue officer, before it had been condemned by a proper decree of the court as forfeited to the United States, is an act of oppression, as it is without authority of law.

6. **SAME—REVENUE OFFICERS.**

Where a revenue officer collects from parties sums of money as special taxes, as wholesale and retail dealers in spirits, when no such taxes have been regularly assessed against them, he is guilty of oppression, although such parties had been guilty of selling spirits at wholesale and retail without a license, as required by law; and the fact that he reported such taxes to the collector of the district as received, and the collector of the district, in his settlement with the revenue department, was required to pay the sums collected after the manner of their collection was fully known to the department, will not render legal the acts of the defendants knowingly and willfully done, without authority of law.

7. **SAME—COMPROMISING OFFENSES.**

The principle and policy of the common law, that a ministerial officer who had arrested a person, and who takes from such person money, or other reward, under a pretense or promise of getting the offender discharged, is guilty of a criminal offense, was intended to be extended, by subdivision 10 of section 3169 of the Revised Statutes, to the officers of the revenue; and any subordinate revenue officer who demands or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money, or other thing of value, for a compromise of the violation of the revenue laws, is guilty of a misdemeanor.

An indictment founded upon the *first* and *tenth* subdivisions of section 3169 of the Revised Statutes.

*James E. Boyd*, Dist. Atty., for the United States.

*C. M. McLoud* and *James W. Gudger*, for defendants.

DICK, D. J., (*charging jury*.) This is the first time that it has been my duty in the course of a trial to construe this statute, and I am not aware of any direct judicial decision upon the subject. I will endeavor to ascertain the meaning of the statute by applying certain well-settled rules of construction which have been adopted by the courts and learned text-writers.

In the construction of a statute we should endeavor to find the intent, object, and purpose of the legislature in enacting the law, and this must be done by considering the words, the context, and the subject-matter. Generally, words must be taken in their ordinary and familiar signification, but when they have acquired a legal and tech-



nical signification we must presume that the legislature used them in their legal and technical sense. The ordinary meaning of the word "extortion" is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. If an officer of the law has a prisoner in custody, and either by promises or threats induces him to make a confession of crime, such confession is regarded as extorted or forced, and is not admissible in evidence against the prisoner. If such confessions are made to a person not in authority, and in no way directly connected with the prosecution, the strictness of the rule is somewhat modified. The word "extortion" has acquired a technical meaning in the common law, and designates a crime committed by an officer of the law, who, under color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due. The officer must unlawfully and corruptly receive such money or article of value for *his own benefit or advantage*.

We may well infer that congress used this word in the statute in its restricted and technical sense, as in the same clause the word "oppression" is used, which has a more extensive signification, and will embrace many other acts of official malfeasance and misfeasance. If a judicial officer, in the discharge of his official functions, acted partially, maliciously, and corruptly, he was indictable at common law for the crime of oppression in office. Gross misconduct on the part of an inferior or ministerial officer was denominated malfeasance, or misfeasance in office. If a ministerial officer arrests and ties a person for some petty offense who makes no resistance, but quietly submits to legal authority, there would be a strong presumption that the officer acted from improper motives of oppression; but if the prisoner was a man of desperate and lawless character, and manifested a purpose to resist or escape, and he is charged with a serious crime, then it would be the duty of the officer to secure the prisoner by the best means in his power.

The word "oppression" has not acquired a strictly technical meaning, and may in this statute be taken in its ordinary sense, which is an act of cruelty, severity, unlawful exaction, domination, or excessive use of authority. When a revenue officer, under color of law, willfully and unlawfully takes the property of another, or subjects him to greater hardships than are necessary for the proper enforcement of the law, he is guilty of oppression. It is not essential that an unlawful act should be a serious injury to a person to make it oppressive. The exercise of unlawful power or other means, in de-

prising an individual of his liberty or property against his will, is generally an act of oppression. One of the wisest and best rulers that ever governed ancient Athens was called a tyrant because he exercised sovereign power contrary to the constitution and laws of the state. He established justice, insured domestic tranquillity, and promoted the general welfare of his people, and yet his numerous beneficences did not atone for his usurpation of authority, and his name, fame, and splendid achievements are associated in history with the odium of tyranny.

In some instances a person may be deprived of his rights and his property without the ordinary process of law, and still the acts not be official oppression. I will illustrate this position by instances which have sometimes occurred in the courts. A person willfully and unlawfully does some serious bodily injury to another. He may be indicted for a crime against the peace and dignity of the state, and he is also liable to an action for the civil injury. If he is indicted and convicted of the crime, the judge, before passing sentence, may properly tell the defendant that if he will make suitable compensation for the civil injury the sentence will be greatly mitigated. The defendant acts upon this suggestion, and pays a large sum of money by way of compensation to the injured party. In such a case the defendant is deprived of his property without the right of trial by jury, and yet this is not judicial oppression; and such proceedings have often been adopted in the courts of the common law, both in this country and in England.

At the federal court in Greensboro some time ago a number of tobacco manufacturers were indicted for violations of the internal-revenue laws. They became satisfied, from the careful preparation of the cases by the assistant district attorney, that they would be convicted, and they pleaded guilty, and on suspension of judgment offered terms of compromise to the commissioner of internal revenue. The terms offered were not accepted, and a sum of money was exacted by way of compromise which made nearly all of the defendants insolvent; and yet these proceedings were not acts of official oppression, as they were done under authority of law. The defendants accepted the terms to avoid the severe punishments to which their violations of law had subjected them. In this court there have been frequent instances of defendants pleading guilty, or, upon conviction, paying sums of money by way of compromise, or in lieu of penalties, in order to obtain suspension of judgment on the crimes charged.

To make an act oppressive on the part of an officer, under this statute, it must be done willfully, "under color of law," and without legal authority. You must carefully consider all the evidence relating to the several counts in the indictment upon this clause of the statute, and if you are fully satisfied from the evidence that the defendant, under color of his office, exacted and received any money or thing of value from the persons named in the indictment, for his own benefit or advantage, which was not due to him, or more than was due, or before it was due, then you may properly find him guilty of extortion as charged in the indictment.

If you are satisfied beyond a reasonable doubt that the defendant, under "color of law," illegally, unjustly, and willfully deprived the persons named in the indictment of their property, or used unauthorized or excessive force towards them in the transactions mentioned, then you may properly find him guilty of oppression under color of law.

It was insisted by the district attorney that the defendant, in using unnecessarily the regular soldiers of the government, was guilty of an act of oppression, as the force was excessive. The soldiers were sent by a superior officer at the request of the defendant, and under orders from the proper department at Washington. While I do not approve of the use of soldiers in the execution of the process of law courts, I will take it for granted, for the purposes of this trial, that the officers at Washington, in ordering the soldiers to be sent to the defendant, did not exceed the limits of their constitutional authority, and the defendant was not guilty of oppression, under color of law, if he used the soldiers properly in accomplishing the purposes intended. If however, the defendant willfully and knowingly made false representations to his superior officers as to the violent and lawless condition of the country, and thus induced his superior officers to send soldiers, which were unnecessary for the proper execution of the law, then he was guilty of an act of oppression, as the mere presence of a company of soldiers was excessive force in a peaceable community, and was well calculated to produce disquietude and alarm among a law-abiding people, who had so recently witnessed the disorder and devastation of war. The peace, security, and well-being of society, and the very existence of political government, require that the laws of the land should be speedily and effectually enforced. For these purposes the law invests its officers with the necessary authority and power for the effectual execution of its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed.

Sheriffs and marshals have the authority to appoint necessary deputies to assist them in the execution of process, and they may also summon the *posse comitatus* for such purpose.

Collectors, deputy collectors, and revenue agents are authorized to make seizure of property for violations of the internal-revenue laws, and the commissioner of internal revenue is empowered to furnish them the necessary force to enable them to perform their official duties. We frequently hear of revenue officers and agents, well armed and in large numbers, making what they call "raids" through the country. When the emergencies of the service require it, all officers of the law should carry with them such assistance as will tend to prevent lawless resistance, or enable them to easily overcome resistance if made. They are not required to risk their lives in an equal rencounter with lawless and desperate men, or desist from the performance of duty when armed resistance is made. The law must be supreme in its appropriate sphere, and its officers, in the execution of its mandate, may use just such force as may be necessary to accomplish its purposes. If they use excessive force, then their acts are unjustifiable and oppressive. If an officer acts honestly, and without any malice or corruption, the force used must appear to be clearly excessive before he is deemed guilty of oppression under color of law. You have heard the evidence as to the existence of the violations of law in the section of country in which the defendant was performing official duty, and as to the character and disposition of the citizens of that community; and it is for you to say whether there was such a condition of insubordination and lawlessness as to justify the proceedings of the defendant.

It was further insisted that the defendant, in cutting and destroying the still of John Wortman before it had been condemned by a proper decree of this court as forfeited to the United States, was guilty of an act of oppression, as he acted without authority of law. The still had been used in the illicit distillation of spirits, and was found in a still-house, and was liable to forfeiture at the time of the unlawful use, but the seizure did not make the forfeiture absolute. The owner was entitled to be heard in proper legal proceedings before his property could be condemned as forfeited. The act of congress authorizing revenue officers, upon certain conditions and under certain circumstances, to destroy illicit stills, had not then been passed. The destruction of said still was, therefore, without authority of law, and the rule of law is that when an unlawful act is done by a person, there is a presumption of an unlawful intent; but this

presumption may be rebutted by facts and circumstances showing that there was no actual unlawful intent. The correspondence between the defendant and the revenue department upon this subject has been read in your hearing, and if this evidence satisfies you that the defendant acted without any unlawful intent, then the presumption of law is rebutted and the defendant is not guilty in this matter, as there must be an unlawful act done with an unlawful intent to constitute crime.

It was further insisted that the defendant was guilty of an act of willful oppression under color of law in collecting from the parties named in the indictment sums of money as special taxes as wholesale and retail dealers in spirits, when no such taxes had been regularly assessed against them. The said parties had been guilty of selling spirits at wholesale and retail without license obtained as required by law. The defendant reported such taxes as received to the collector of the district, but the same were not reported by the collector to the revenue department at Washington until after the commencement of this prosecution. The collector, in his settlement with said department, was required to pay the sums collected, after the manner of their collection was fully known in the offices of the department. This payment did not render legal the acts of the defendant, if he acted, knowingly and willfully, without authority of law. The department had the power to have such taxes assessed against the parties named for selling spirits at wholesale and retail without license. You have heard the correspondence between the defendant and the revenue department upon this subject, and if you believe that he was instructed or authorized to make such collection of special taxes then he cannot be held criminally liable. The defendant, without any warrant of distraint, advertised the lands of some of the parties named in the indictment for sale for non-payment of the special taxes referred to. The lands were not sold and the possession of said parties was in no way disturbed. This was not an act of oppression, as it resulted in no injury; but it may be considered in connection with other acts as tending to manifest a purpose of oppression on the part of the defendant.

This court has no jurisdiction over crimes, except those defined and declared by a statute of the United States. It never enters the broad fields of the common law to investigate and punish offenses committed by its officers, unless provision is made for such proceedings by a federal statute. It looks to the common law for instruction and guidance as to the forms and modes of procedure in a

criminal trial, but never as a source of jurisdiction in matters of crime. This indictment is founded upon a federal statute, and the defendant cannot be convicted except for acts of misfeasance and malfeasance mentioned in the statute, and distinctly and positively charged in the indictment. It is therefore unnecessary for me to consider the able arguments of the district attorney and the authorities cited by him as to the offenses of officers at the common law which are not embraced in the statute and indictment before us.

I will now give you my construction of the tenth subdivision of the statute, upon which some of the counts in the bill of indictment are founded. At the common law it was an offense against the administration of justice for a ministerial officer who had arrested a person to take from him money or other reward under a pretense or promise of getting the offender discharged. Such an act was justly regarded as a gross impropriety and breach of duty on the part of an officer employed by the government to assist in the enforcement of the law. The officer could not properly receive any compensation in such matters except his lawful fees. The statute before us was intended to extend this wise principle and policy to the officers of the revenue. They cannot receive anything in the course of official duty except the compensation allowed by law; and they cannot rightfully do any act which is not authorized by law, under color of office. They have no authority to make compromises of any charge or complaint for any violation or alleged violation of the revenue laws. Such authority is alone intrusted to the commissioner of internal revenue, acting with the advice of the secretary of the treasury.

If, therefore, any subordinate revenue officer demands or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise of a violation of the revenue laws, he is guilty of a misdemeanor under this clause of the statute. Before you can find the defendant guilty under this count, you must be fully satisfied from the evidence that he agreed to make a compromise as charged, and received in consideration of such agreement some thing of value for *his personal benefit*. You have heard the evidence and the comments of counsel upon this point, and it is your duty to determine whether this clause of the statute, as construed by the court, has been violated by the defendant. If you have any reasonable doubt upon the subject you should give the benefit of that doubt to the defendant. Upon a trial for crime the law presumes the defendant innocent, and that presumption remains as a protection to him until removed by evi-

dence that satisfies a jury, beyond a reasonable doubt, as to his guilt.

In delivering this charge I have carefully endeavored to avoid any expression or intimation of opinion as to the weight of the evidence. You should not in any degree be controlled in your verdict by any conjectures which you may make as to the opinion of the court upon questions of fact. The evidence should alone control you upon such questions, and I believe that you will render an honest and just verdict.

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GRAHAM v. SPENCER.

(Circuit Court, D. Massachusetts. December 20, 1882.)

1. FOREIGN JUDGMENT—IMPEACHMENT.

Where a foreign judgment is sued on or is set up in bar, the party supposed to be bound by it may aver and prove, even in contradiction of the record, any jurisdictional fact appearing therein, as that he was not a resident within the territorial jurisdiction of the court rendering it; that he was not personally served with process within that jurisdiction; and that the attorney who appears for him had no authority to do so.

2. JURISDICTION—BY ATTACHMENT.

An attachment gives no jurisdiction over the person; and a law of the state cannot authorize its courts to enter judgment against a non-resident not served which will be valid even against property within the state, except such as has been attached on *mesne process*.

3. SAME—APPEARANCE—WITHDRAWAL OF.

The appearance of a non-resident defendant by attorney, to plead to the jurisdiction of the court only, and the withdrawal of such appearance by leave of court, is not a submission of defendant's person to the jurisdiction of the court, but leaves the case as if there had been no appearance.

4. SAME—AUTHORITY OF ATTORNEY.

A record which shows an appearance by attorney may be explained by proof that the attorney was not authorized to submit the defendant to the jurisdiction of the court.

5. JUDGMENT—RES ADJUDICATA.

The judgment of the state court overruling the plea to the jurisdiction, was not a decision upon the question of the submission of defendant's person to the jurisdiction so as to make it *res adjudicata*.

At Law.

Trial by jury having been waived, the court found the following facts:

This is an action upon a judgment rendered in the county court at Windsor, Vermont, at the term which began December 2, 1873, for the plaintiff against the defendant, for \$3,880 debt, and \$33.01 costs of suit, and interest amount-

ing now to more than \$5,000. The record of that action, and the docket entries therein, are made part of this finding. The defendant, with Joseph Vila, Jr., and Jabez F. Wardwell, were sued in *assumpsit*, and were described as formerly partners under the firm of Spencer, Vila & Co., of Boston, and all as residing in Massachusetts, which was the fact. The return of the officer set out an attachment of 800 shares of the preferred stock of the Rutland Railroad Company as the property of this defendant, and a service of the summons by leaving a copy with the officers of the company in Vermont, where that corporation had its abode. The writ was returnable in May, 1873, and at that time the appearance of the Hon. Julius Converse, an attorney of the court, was entered on the docket in the usual form, and a plea in abatement and motion to dismiss were filed by him for this defendant on the ground that the attached shares were not his and that he had not been served with process. To the word "Converse," on the docket, in the handwriting of the clerk, were added, in the hand of Mr. Converse, the words, "for Spencer." The clerk of the court testified that he had no doubt that he was told by Mr. Converse to enter his appearance, but in what words he could not say. It might be that Mr. Converse handed him the plea in abatement and said, merely, I appear for the defendants, or for Spencer, or something to that effect. Mr. Converse was not examined, but it was admitted that he is very old, and not in a mental condition to recollect what occurred. The defendant received by mail, from the clerk of the railroad company, as he supposed, a copy of the summons, and consulted with Mr. Keith, an attorney of Boston, who advised him not to enter a general appearance, or submit to the jurisdiction, but said that he might safely plead to the jurisdiction. The defendant authorized Mr. Keith to employ an attorney in Vermont, for this purpose, and for no other, and Mr. Keith wrote a letter to Mr. Converse, a copy of which is made part of this case, in which he said, among other things, "You will, of course, guard against giving your court jurisdiction by a *general appearance*, if they have not jurisdiction on their assumed attachment, and you can judge best as to the best means of testing that question." The plea in abatement and motion to dismiss were overruled at the May term. At the December term the case was set for trial, but was not tried, and before the time for trial came, Mr. Converse, by leave of court, withdrew his appearance. The docket shows that this was December 24th. On the same day, the defendant Spencer was defaulted. A motion for leave for the officer to amend his return was made; when, does not appear. It was tried December 31st and denied. The case was dismissed, as to Vila and Wardwell, who had not been served with process, and whose property, or supposed property, had not been attached.

Rule 11, of the county court, is as follows;

"If an action shall have been continued for trial, and no special plea shall have been filed within the rule, the general issue shall be considered as pleaded, and the defendant may proceed to trial thereon."

The defendant offered to prove in the case here that he had a valid defense to the original action in Vermont; but the court ruled that such evidence was immaterial.



*J. B. Richardson*, for plaintiff.

*E. R. Hoar* and *E. F. Hodges*, for defendant.

LOWELL, C. J. It was said in argument by the senior counsel for the plaintiff, who is in a position to know the law of Vermont, that the courts of that state still adhere to the doctrine which was supposed to have been announced in *Mills v. Duryee*, 7 Cranch, 481, that judgments of one state are to be treated in the courts of another state precisely like domestic judgments, so that, for example, the record of service, or of appearance, cannot be contradicted. The latest case which he cited was *Lapham v. Briggs*, 27 Vt. 26, decided in 1854. I have not examined the later reports, because the supreme court, as early as 1848, had held that the record of a circuit court which recited a general appearance for two defendants might be "explained" by proof that he intended to appear for one only, and the same court, following and approving the many able judgments upon the subject in the courts of the states, have held that in any court, whether of the states or of the United States, in which a foreign judgment is sued upon, or is set up in bar, the party supposed to be bound by the judgment may aver and prove, even in contradiction of the record, that he was not a resident within the territorial jurisdiction of the court giving the judgment, that he was not personally served with process within that jurisdiction, and that the attorney who appeared for him had no authority to do so.

The rule that a record shall not be impeached is largely a rule of convenience, and it is held to be more inconvenient, and therefore more unjust, to turn an injured person over to an action against a sheriff or an attorney in a foreign state, than to permit the truth to be shown in a collateral action. *Galpin v. Page*, 18 Wall. 350; 3 Sawy. 93.

A joint judgment against two defendants, when only one has been served with process within the state, is a nullity as to the other. *D'Arcy v. Ketchum*, 11 How. 165. Any jurisdictional fact appearing in the record of a foreign judgment may be met by plea and proof to the contrary, such as, that the seizure of a vessel was made in a certain county, (*Thompson v. Whitmore*, 18 Wall. 457;) that personal service was made, (*Knowles v. Gas-light Co.* 19 Wall. 58;) if an appearance was entered that it was not authorized, and this, though the case has been tried on its merits against one defendant, who, apparently, acted for both, (*Hall v. Lanning*, 91 U. S. 160.) Personal notice out of the jurisdiction is of no value. *Bischoff v. Wethered*, 9 Wall. 812. It has been held in Pennsylvania that an acceptance of service out of the jurisdiction means only a waiver of service at the place where it

was accepted, and therefore gives no jurisdiction. *Scott v. Noble*, 72 Pa. St. 115. An attachment gives no jurisdiction over the person, and a law of the state cannot authorize its courts to enter a judgment against a non-resident not served which will be valid even against property in the state, except such as has been attached on *mesne process*. *Pennoyer v. Neff*, 95 U. S. 714.

The remaining questions, not fully covered by these authorities, are: (1) Whether, supposing the attorney to have been fully authorized, the facts show a submission of the defendant's person to the jurisdiction of the court. (2) Whether the authority of the attorney can be qualified by evidence. (3) Did the court in Vermont decide the above question, thus making it *res judicata*?

1. It must be admitted that upon the record itself, as it appeared to the court in Vermont, there had been an attachment of the goods of the defendant. When he appeared and asked leave to contradict the fact of his ownership of the goods, he must be considered, I think, to have waived notice by publication, and no such notice was given. *U. S. v. Yates*, 6 How. 605.

Taking into view the facts that the attorney was instructed that there was a good defense to the action on its merits, but that he was not to make that defense; that, accordingly, he pleaded to the jurisdiction only, and then, by leave of court, withdrew his appearance, we are warranted, by the nature of the case and by the authorities, in saying that no jurisdiction over the person had been acquired. I assume, throughout this discussion, that the withdrawal is by leave of court. It was said by an eminent judge that a withdrawal of appearance leaves the case as if there had been no appearance. *Michew v. McCoy*, 3 Watts & S. 501, per GIBSON, C. J. In that case it was held that no judgment could be entered against the defendant, though there had been personal service upon him. It was explained, in a later case, that this decision depended upon the particular statute relating to ejectment, and that if personal service has been made in a personal action the defendant may be defaulted when his attorney withdraws. *Dubois v. Glaub*, 52 Pa. St. 238. In that case, however, the court repeat the saying that a withdrawal leaves the case as if there had been no appearance. Where a defendant withdraws after pleading to the merits and agreeing to a judgment, his withdrawal is without effect, and merely means that he does not wish to incur more costs. *Habich v. Folger*, 20 Wall. 1. So, when he withdraws his plea to the merits, without withdrawing his appearance, the jurisdiction is saved, (*Eldred v. Bank*, 17 Wall. 545;) but if he with-

draws both his plea and his appearance, and has not been served with process, no valid judgment can be rendered against him. *Forbes v. Hyde*, 31 Cal. 346. If he withdraws "without prejudice to the plaintiff," the court may, of course, proceed as if he were still in its presence. *Creighton v. Kerr*, 20 Wall. 8.

This last case is noticeable for the incidental remark of HUNT, J., (page 13,) that if the withdrawal of appearance had been unqualified, as in *Eldred v. Bank*, 17 Wall. 545, the result might have been the same. In *Eldred v. Bank* there was no withdrawal of the appearance, but only of the plea; and the argument of MILLER, J., assumes throughout that if the appearance also had been withdrawn, the jurisdiction must have followed it. I do not mean to say that it would be so unless the plea to the merits had likewise been withdrawn. I have cited two cases from Pennsylvania and one from California, and all other cases which I have seen are to the same effect, that the withdrawal of appearance, when there has been no plea to the merits, or if that, too, has been withdrawn, leaves the case as it was before the appearance was entered. *Lodge v. State Bank*, 6 Blackf. 557; *Cunningham v. Goellet*, 4 Denio, 71; *Lutes v. Perkins*, 6 Mo. 57; *Wynn v. Wyatt*, 11 Leigh, 584. I understood it to be admitted that if the appearance has been special in form, and then a withdrawal, the personal jurisdiction would not have attached, as in *Wright v. Boynton*, 37 N. H. 9. In several of the cases above cited there is nothing in the report to show that the appearance was special. The fact of the withdrawal after the plea or motion was overruled seems to have been deemed enough. Two cases in the supreme court, taken together, will show that a mere appearance without pleading to the merits is not necessarily a submission. *Jones v. Andrews*, 10 Wall. 327; *Harkness v. Hyde*, 98 U. S. 476. But it is insisted that by virtue of rule 11 of the court in Vermont the defendant had pleaded the general issue. That rule was intended as a convenience to defendants, and not as a trap for the unwary. It gives a defendant the right to go to trial on the general issue, if he has filed no other plea to the merits. Such a constructive pleading as that cannot be a waiver of personal service. Jurisdiction does not depend upon such conventions. The defendant never did go on trial on that or any other issue to the merits.

2. I am further of opinion that the record may be explained by proof that the attorney was not authorized to submit the defendant to the jurisdiction of the court. This is taken for granted by GRAY, C. J., in *Wright v. Andrews*, 130 Mass. 149, 150, even when there

had been a trial on the merits. Here there was no trial, and if the acts of the attorney might, on their face, seem to intend a general appearance, which I hardly think they do, considering the testimony of the clerk; still, as there is no estoppel, because the plaintiff was left, not only as well, but better off than before, because the appearance waived publication, I hold that the limitation of authority may be shown.

3. It is strenuously argued for the plaintiff that the court in Vermont has decided this very question, and it cannot, therefore, be again litigated. I admit the law, but not the fact. It is plain that no question of personal jurisdiction was intended to be submitted, and I conceive that none such was submitted by the plea in abatement. Why the plea was overruled does not distinctly appear. It may have been for defect of form, for such pleas are *stricti juris* in Vermont. *Smith v. Chase*, 39 Vt. 89. It may have been that the demurrer to the plea was held to admit only such facts as the record itself did not contradict, and the record showed an attachment. This was probably the ground, for the officer afterwards moved to be permitted to amend his return, which motion was denied. I should be inclined to think that the reason which I assume to have governed the court was a perfectly valid ground for all that was done. It is not usual or convenient, at least in New England, to contest an attachment in the action itself in which it is laid. If the defendant did not own the shares of stock, no levy could be successfully made upon them, and none has been made. The judgment is wholly unsatisfied. He was not injured by the mistake.

When the plea was overruled, the proper order of the court was that the defendant answer over. He might do so if he pleased. When he withdrew, with leave of the court, the consequences followed which I have before explained, but the judgment was properly and regularly entered in full against him. The form of judgment is not objected to, and is always the same, whether its operation is personal or only *in rem*. Therefore, the form of the judgment is not only correct, but it proves nothing as to the grounds for overruling the plea. Now that we have established, by virtue of our laws of attachment, a qualified jurisdiction *in rem* over non-residents, it would be well to change our form of judgments in those cases, but Vermont has not done so, nor any other state, so far as I am informed. We still follow the old form adapted to the old cases of undoubted jurisdiction, but of doubted regularity of procedure, in which, if there were no plea, or if it were overruled, the judgment was entered in chief, or the defend-

ant answered over, as the case might be. If the defendant had not appeared, the judgment would have been precisely what it was here.

It is asked why did the defendant appear, if not to submit generally to the jurisdiction, when, if he had stayed away, the present questions could not have been mooted. He may not have been wise, but his motive probably was to prevent the recovery of a judgment, which, as the law of Vermont is understood to be, and as it undoubtedly was in 1873, would be held a valid personal judgment against him in that state. Decisions of the state courts, affirming the validity of judgments obtained in other states, could not have been reviewed by the supreme court of the United States until the adoption of the fourteenth amendment, and I do not know that any such case has been so reviewed since that time, though there is an intimation in *Pennoyer v. Neff*, 95 U. S. 714, that such a jurisdiction may now exist. It was therefore of some importance to the defendant to prevent a judgment from being obtained which might oblige him to avoid the state of Vermont, which he had some occasion to visit.

I decide that the judgment sued on is not a valid personal judgment against the defendant. Twenty days are given for settling a bill of exceptions, after which there will be judgment for the defendant.

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### TILTON v. BARRELL and another.\*

(Circuit Court, D. Oregon. December 27, 1882.)

#### 1. MARRIED WOMAN—STATUTORY RIGHTS.

Under the act of October 21, 1880, (Sess. Laws, 6,) the wife is relieved of all "civil disabilities" not imposed upon the husband; and her "rights and responsibilities" as a "parent" are "equal" to those of the latter, and therefore she is, in legal contemplation, as much the head of the family as he is, and he may as well be presumed to be living with her as she with him.

#### 2. SAME—LIABILITY AT COMMON LAW.

At common law a husband and wife might be jointly sued for a trespass which, in legal contemplation, might be committed by two persons; and this includes an action of ejectment, which was originally only a remedy for trespass upon the rights of the termor or lessee, by depriving him of the possession during his term or time in the land.

#### 3. SAME—LIABILITY UNDER STATUTE.

But under the act of October 21, 1880, *supra*, the wife is as liable for the unlawful occupation of another's property as the husband is; and, if they are both in the possession they may be joined as defendants in an action to recover the same as though they were unmarried, and an allegation in the complaint that they "are husband and wife," is immaterial and may be disregarded.

\*Affirmed. See 7 Sup. Ct. Rep. 332.

At Law. Action to recover possession of real property.

*Henry Ach*, for plaintiff.

*W. W. Chapman*, for defendant.

DEADY, D. J. The plaintiff, a citizen of New York, brings this action against the defendants, citizens of Oregon, to recover the possession of a tract of land containing  $13\frac{1}{4}$  acres, alleged to be worth \$13,000, and situate in the county of Multnomah. It is alleged in the complaint that the plaintiff is the owner in fee-simple of the premises, and entitled to the possession of the same; that "the defendants are husband and wife," and are in "the wrongful and actual possession" of the premises, and "wrongfully withhold a possession thereof from the plaintiff."

The defendant Aurelia Jane Barrell demurs to the complaint, and assigns as causes of demurrer the following:

"(1) That as the wife of Colburn Barrell she is improperly joined with him in the plaintiff's complaint.

"(2) That the complaint does not state facts sufficient to constitute a cause of action, because she is sued as the wife of her co-defendant, and there are no allegations in the complaint of a cause of action for which she, as such, is responsible or liable."

The allegation that "the defendants are husband and wife" is an immaterial one—quite as much so as if it had been alleged they were father and daughter, brother and sister, uncle and niece, or even partners in trade. The defendants are not sued *as* "husband and wife," but as Colburn and Aurelia Jane Barrell,—two natural persons, and distinct individuals,—to recover from them and each of them the possession of certain premises which plaintiff alleges that they, both of them, wrongfully withhold from him. A judgment against one of them for the possession will not authorize the removal of the other. Nor is it known but that the defendants are in possession under a claim of right to or interest in the premises in both the husband and wife, or in the latter exclusively. Assuming, as the demurrer admits, that the complaint is true, the occupation of the premises by the wife is as much a wrong to the plaintiff as the husband's. The removal of one of them upon the judgment and process of the court is as necessary to the full enjoyment of his right of possession as the other.

By the act of October 21, 1880, (Sess. Laws, 6,) the wife is relieved of all "civil disabilities" not imposed upon the husband. Her "rights and responsibilities" as a "parent" are "equal" to those of the husband. In short, she is now, in legal contemplation, as much the

head of the family as he is, and he may as well be presumed to be living with her as she with him. More properly speaking, they may be said to live together as equals—conforming, so far as may be, their individuals wills and conduct to the requirements and exigencies of the marital relation.

But I do not understand that, even at common law, ejectment to recover the possession of premises unlawfully withheld did not include the case of an unlawful occupation by a married woman, or that her occupation, if conjointly with that of her husband, was therefore so merged in his that the law could not take cognizance of it and give relief against it directly.

Mr. Chitty says (1 Chit. 105) that for "trespass, which may in legal contemplation be committed by two persons conjointly, and for which several persons may be jointly sued, the husband and wife may be sued jointly for the act of both;" but the wife can only be sued "for her own actual wrongful trespass," and cannot become a party to a trespass "by her previous or subsequent assent" thereto during coverture.

The foundation of the action of ejectment—*ejectione firmæ*—is the trespass committed by the intruder upon the term of the termor or lessee, and originally the relief obtained by it was confined to damages for such trespass, but by the end of the fifteenth century the plaintiff in the writ was allowed to recover both his term and damages. Adams, Eject. 7-9.

The trespass or injury to the plaintiff's right of possession complained of in this case, so far as appears, is the act of each of the defendants, and can only be redressed by a judgment for the possession against both of them. It may be that if the husband is removed from the premises, the wife, from considerations of domestic convenience or marital obligations, will follow him. But she may not; and, as has been said, she may remain in the possession, claiming the same in her own right, and may also allow her husband to return to the premises and occupy under her, and thus compel the plaintiff to relitigate his right to the possession with her in a separate and subsequent action. But the plaintiff is entitled to bring his action against all persons in the actual possession of the premises (Or. Code Civil Proc. 314) and recover the same, as against them all, in one action. If there is any one among them who has no claim to the possession otherwise than as a person sustaining a domestic relation to a co-defendant, he or she must decline the contest, or stand or fall with such co-defendant.

The demurrer is overruled.

**BULL and others v. FIRST NAT. BANK OF KASSON and another.**

(Circuit Court, D. Minnesota. January, 1883.)

**1. NEGOTIABLE PAPER—DRAFT—WHEN OVERDUE.**

In determining a question as to the sufficiency of a defense interposed by the drawer or indorser of a draft, payable on presentation or demand, when sued thereon, the draft must be considered as overdue if it was not presented for payment within a reasonable time, and a delay of over five months is unreasonable.

**2. SAME—REASONABLE DILIGENCE IN PRESENTMENT AND DEMAND.**

The holder of a draft or check, payable on demand, is bound to use reasonable diligence in forwarding the same according to the usual course of business, and notice of non-payment be given to the indorser in order to hold him.

**3. SAME—DEFENSES—SET-OFF.**

Under the statute of Minnesota defendant may set up any claim against the original party which arose out of the subject-matter of the action, or was acquired by defendant while the chose in action was in possession of the original party, or before defendant had notice that he had assigned it for a valuable consideration.

At Law.

Jury waived, and tried by the court.

*Lamprey, James & Warren*, for plaintiff.

*Charles C. Willson and Jones & Gove*, for defendants.

MCCRARY, C. J. This is a suit upon two drafts drawn by the defendant bank in favor of the defendant La Duc, for \$500, each dated October 13, 1881. They are in the usual form of bank drafts. No time of payment is named, but they were payable upon presentation and demand. On the day of their date they were indorsed by defendant La Duc and delivered to one M. Edison, who, the next day, left the state of Minnesota, carrying the drafts with him, and leaving numerous debts unpaid and no property out of which they could be collected. The said Edison held the drafts over five months without presenting them for payment, and then sold them to the plaintiffs at Quincy, Illinois. The bank pleads by way of defense a set-off or counter-claim against Edison. The defendant La Duc claims that he is discharged as indorser by the long delay before the drafts were presented for payment.

The sufficiency of these defenses depends upon the question whether the paper can be regarded as overdue or dishonored at the time the plaintiffs took it. The general rule undoubtedly is that a draft or check is not due, for the purpose of being made the foundation of a suit against the drawer or indorser, or for the purpose of



determining questions arising under the statute of limitations, or for other similar purposes, until it is presented. But I am of the opinion that in determining a question as to the sufficiency of a defense interposed by the drawer or indorser of such an instrument, when sued thereon, the paper must be considered as overdue if it has not been presented for payment within a reasonable time. Cases may arise in which courts may find some difficulty in deciding whether presentation has been made within a reasonable time, but the present case presents no such difficulty. A delay of over five months is plainly unreasonable. The holder of the draft is not obliged to proceed by the first conveyance to the place of payment to present it for payment, nor is he bound to send it by the first mail. He may retain it in his possession for a time, and if he is traveling may for convenience carry it with him in lieu of money, especially if he intends shortly to be at the place of payment to collect it; but he cannot hold it five months without either going or sending to the drawer for his money, especially where the place of payment can be reached by him in a few days. The law presumes, and the parties to such paper may act upon the presumption, that the draft is drawn in the usual course of such transactions as a convenient method of transmitting funds from one place to another, and that it will be presented to the drawer in due time, and will not be held indefinitely by the payee without presentment. Such is the rule by which we are to be governed in determining whether the paper is, in the hands of an indorsee, subject to defenses which were good as against the payee and indorser. In other words, the holder of such paper is bound to use reasonable diligence in forwarding the same according to the ordinary course of business. *Edw. Bills & Notes*, 386 *et seq.*; *Walsh v. Dart*, 23 Wis. 334, and cases cited.

A draft payable on demand (and such in legal contemplation are the instruments here sued on) must be presented and payment demanded within a reasonable time, and notice of non-payment given to the indorser, in order to hold him. And "the circumstances and considerations which determine the question whether or not a bill or note payable on demand has become overdue, so as to let in equitable defenses by the original parties against the transferee, alike determine the question whether or not the presentment has been made in a reasonable time, so as to charge the drawer or indorser." 1 *Daniel*, Neg. Inst. 611.

Being clearly of the opinion that the drafts sued on in this case were not presented for payment within a reasonable time, I must

hold that defendant La Duc, the indorser, is discharged, and that the defendant bank is entitled to offset any valid claim held by it against Edison while the drafts belonged to him. This for the reason that the statute of Minnesota so provides. The following are the statutory provisions upon the subject:

Chapter 65, § 40. "If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it becomes due, a set-off to the amount of the plaintiff's demand may be made of a demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set-off against the assignor while the note or bill belonged to him."

Chapter 66, § 27. "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

Under these provisions the supreme court of Minnesota has held that the rule of set-off is so enlarged as to "enable the defendant to set up any claim against the original party which arose out of the subject-matter of the action, or was acquired by the defendant while the chose in action was in the possession of the original party, or before the defendant had noticed that he had assigned it for a valuable consideration." *Martin v. Pillsbury*, 23 Minn. 175. It is our duty to enforce the statute as construed by the supreme court of the state. *Partridge v. Ins. Co.* 15 Wall. 573-580.

The set-off of the bank consists of five promissory notes executed by Edison. As to four of them the evidence is satisfactory that the bank owned them prior to the purchase of the drafts by plaintiffs, and these are clearly entitled to set-off against the plaintiffs.

As to the last note, to-wit, note dated September 7, 1874, for \$550, due one month after date, I am unable to recall any evidence that it was purchased by the bank prior to the transfer of the drafts to the plaintiffs. As it was purchased after maturity there is no presumption as to the time of the purchase, and the burden is upon defendant to show the actual date, and that it was at a time when Edison still held the drafts. As the trial before me was a hurried one, and my minutes of the testimony are not full, it may be that this proof was made and that I did not observe it, or have forgotten it.

If defendant desires to do so, he may offer further proof upon the point, to which plaintiff may reply; but if no further evidence is offered, the offset as to the other notes will be allowed, and as to this one, rejected, and judgment rendered accordingly.

LIVERPOOL, BRAZIL & RIVER PLATTE NAVIGATION Co. v. AGAR &  
LELONG.\*

(Circuit Court, E. D. Louisiana. December, 1882.)

1. PARTNERSHIP—LIABILITY IN SOLIDO.

Under the law of Louisiana a commercial partnership is an entity, capable of being sued, is brought into court as defendant by service of citation upon one of its members, and while the ultimate liability of the partners is *in solido*,—i. e., joint and several,—they, during the life of the partnership, cannot be charged individually except through the partnership.

2. JURISDICTION—PARTNERS—SUIT BY ALIEN.

This court has jurisdiction of a suit by an alien against a partnership consisting of two partners, one of whom is also an alien, and one a resident citizen, the partnership being domiciled in Louisiana, and the obligation sought to be enforced originating there.

W. S. Benédict, for plaintiff.

Charles E. Schmidt, for defendants.

BILLINGS, D. J. The facts relating to the exceptions in this case are undisputed. This is a suit to recover upon a demand in favor of the plaintiff against the defendants as constituting the commercial firm of Agar & Lelong, domiciled and doing business in the city of New Orleans, and there incurring the obligation sought to be enforced. The partnership and each of the members have been cited, and have severally pleaded the want of jurisdiction in this court, on the ground that the plaintiff is an alien, and that Lelong, one of the defendants, is also an alien. It is conceded that Agar is a citizen of Louisiana; that the partnership of Agar & Lelong was a commercial partnership, domiciled and doing business in the city of New Orleans, and composed of the defendants, Agar and Lelong, and that the obligation sued on originated there. It is urged, as legal consequences of these admitted facts, (1) that since the partnership of the defendants is in active existence under the laws of Louisiana, it alone can be sued upon a partnership obligation; (2) that since plaintiff and one of the defendants' firm are aliens, the court is without jurisdiction as between the plaintiff and defendants' firm.

I think the first proposition is correctly stated. Under the law of Louisiana a commercial partnership is an entity, capable of being sued, is brought into court as defendant by service of citation upon one of its members, and while the ultimate liability of the partners is *in*

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

*solido*,—i. e., joint and several,—they, during the life of the partnership, cannot be charged individually except through the partnership; that is, during the life of the partnership a partner is, like a corporator in a corporation, liable and made to respond individually only through a judgment against the intellectual being of which he is a component part. In *Breedlove v. Nicolet*, 7 Pet. 413, under circumstances exactly similar to those in this case, with reference to a Louisiana partnership, the supreme court maintained jurisdiction and gave judgment in favor of an alien plaintiff against two members of a partnership, though the third was not suable by reason of residing in Alabama. But this point as to the liability of the partnership alone in the first instance, and so long as its active existence continues, was not presented. I think the proposition of law here presented must be maintained as resulting from our peculiar law, though it would be true in no other state of the Union. Elsewhere the partners are always individually liable, and the partnership as a distinct being cannot be cited. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the citation may be served upon the firm by service upon the partner. The exception of the individual partners must therefore be maintained, so far as the attempt is made to sue them individually.

2. This brings us to the remaining question. In a suit by an alien against a partnership consisting of two partners, one of whom is also an alien, the partnership being domiciled in Louisiana, and the obligation sought to be enforced originating there, does this court have jurisdiction? I think it has. See *Marshall v. Baltimore R. R.* 16 How. 325, and *Inbusch v. Farwell*, 1 Black, 566. Indeed, under the provisions of the law of Louisiana a partnership is, so far as this question of jurisdiction is concerned, placed in the category of corporations. Both are creations of a state law, and domiciled in that state. Both may have members who, by themselves, could not be brought within the jurisdiction of the circuit court. Nevertheless, the supreme court has finally settled the doctrine that state corporations, domiciled within the state by which they are created, are, so far as relates to the enforcement of rights of action by suit, citizens of that state, although some of the corporators would not be within the jurisdiction. *Louisville R. R. v. Letson*, 2 How. 554; *Ry. Co. v. Whitton*, 13 Wall. 283. The reasoning which leads to this conclusion, with reference to corporations, leads to the same conclusion with reference to Louisiana commercial partnerships.

The exception, so far as relates to jurisdiction over the partnership as a defendant, is overruled, and five days are allowed in which to file an answer.

A partner's interest in the partnership property may be attached or levied upon and sold on execution for his individual debt;(a) so partnership goods may be levied on under executions against one partner for his separate debt,(b) and equity will not enjoin such sale until the partnership accounts are taken and liquidated.(c) Attachment of partnership assets by an individual creditor is illegal and must be dissolved, and the attached property be surrendered to the liquidator.(d) The creditor of a partner cannot subject the interest of a copartner to the satisfaction of his claim.(e) He can sell on execution only the interest of the debtor partner in the firm property after payment of debts due by the firm,(f) and a specific asset or property of the firm is not subject to attachment, execution, or garnishee process against an individual partner.(g) The interest sold is his share in the surplus after all demands against the firm are satisfied.(h) Where a partner advanced certain of his individual property to pay a firm indebtedness, the general partnership creditors should be paid before the advance could be paid to the partner.(i) The title to the property still remains in the firm, and the purchaser acquires only a right to an accounting.(j) The separate creditor may at any time after levy and before sale file a petition against the other partners for an accounting of the joint business;(k) but a suit in equity is necessary.\* The judgment debtor may elect to have the account taken before the sale.(l) The Massachusetts statute, providing for the delivery to a part owner of property attached in a suit against another part owner, does not apply to the case of partnership property attached in a suit against a partner.(m) Where a sepa-

(a) *Wilson v. Strobach*, 59 Ala. 488; *James v. Stratton*, 32 Ill. 203; *Newhall v. Buckingham*, 14 Ill. 405; *White v. Jones*, 38 Ill. 159; *Hershfield v. Clafin*, 25 Kan. 166; *Marston v. Dewberry*, 21 La. Ann. 518; *Choppin v. Wilson*, 27 La. Ann. 444; *People's Bank v. Shryock*, 48 Md. 427; *Saunders v. Bartlett*, 12 Heisk. 316; *Weaver v. Ashcroft*, 50 Tex. 428.

(b) *Place v. Sweetzer*, 16 Ohio, 142.

(c) *Sitler v. Walker*, 1 Freem. Ch. 77; *Place v. Sweetzer*, 16 Ohio, 142.

(d) *New Orleans v. Gauthereaux*, 32 La. Ann. 1126.

(e) *Dieckmann v. St. Louis*, 9 Mo. App. 9.

(f) *Merrill v. Rinker*, Bald. 528; *Jones v. Thompson*, 12 Cal. 191; *Brewster v. Hammet*, 4 Conn. 540; *Lyndon v. Gorham*, 1 Gall. 367; *Knox v. Schepler*, 2 Hill. (S. C.) 595; *White v. Dougherty*, Mart. & Y. 309; *Pierce v. Jackson*, 6 Mass. 242; *Hacker v. Johnson*, 66 Me. 21; *Williams v. Gage*, 49 Miss. 777; *Tappan v. Blaisdell*, 5 N. H. 190; *Menagh v. Whitewell*, 52 N. Y. 146; *Knox v. Summers*, 4 Yeates, 477; *McCarty v. Emlen*, 2 Yeates, 190.

(g) *Marston v. Dewberry*, 21 La. Ann. 518; *Levy v. Cowan*, 27 La. Ann. 556; *Bullfinch v.*

*Winchenbach*, 3 Allen, 16; *Claggett v. Kilbourne*, 1 Black, 346; *London v. Gorham*, 1 Gall. 367; *Cook v. Arthur*, 11 Ind. 407; *People's Bank v. Schryock*, 48 Md. 427; *Fisk v. Herrick*, 6 Mass. 271; *Atwood v. Meredith*, 37 Miss. 635; *Hacker v. Johnson*, 66 Me. 21; *Gibson v. Stevens*, 7 N. H. 352; *Garvin v. Paul*, 47 N. H. 158. Contra, *Thompson v. Lewis*, 34 Me. 167; *Fogg v. Lawry*, 68 Me. 78.

(h) *Place v. Sweetzer*, 16 Ohio, 142; *Osborn v. McBride*, 16 Bank. Reg. 22.

(i) *Gordon's Estate*, 11 Phila. 136.

(j) *Andrews v. Keith*, 34 Ala. 722; *Wilson v. Strobach*, 59 Ala. 488; *Sitler v. Walker*, 1 Freem. Ch. 77; *Barrett v. McKenzie*, 24 Minn. 20; *Deal v. Boone*, 20 Pa. St. 228; *Rheinheimer v. Hemingway*, 35 Pa. St. 432; *Smith v. Emerson*, 43 Pa. St. 456; *Lathrop v. Wightman*, 41 Pa. St. 237. See *Atkins v. Saxton*, 77 N. Y. 195.

(k) *Nixon v. Nash*, 12 Ohio St. 647.

(\*) *Broadnax v. Thomason*, 1 La. Ann. 383; *Nixon v. Nash*, 12 Ohio St. 647; *Knight v. Ogden*, 2 Tenn. Ch. 473.

(l) *Hacker v. Johnson*, 66 Me. 21.

(m) *Breck v. Blair*, 129 Mass. 127.

rate creditor levied upon and sold an undivided one-half of the partnership property without bringing an action to determine such partner's interest, *held*, that a creditor of the firm who subsequently levied upon the property may maintain an action in equity to determine the conflicting claims of the creditors.<sup>(n)</sup> An individual creditor who has attached partnership assets is not a necessary party to a suit in which a liquidator is subsequently appointed.<sup>(o)</sup> A judgment, although signed by two partners, will be considered an individual indebtedness unless shown to be for a partnership debt.<sup>(p)</sup> Real estate of the firm may be treated as personalty in so far as may be necessary to secure the payment of the firm debts.<sup>(q)</sup> If purchased with partnership funds, though the title be taken in the individual name of one or both parties, it is first subject to the partnership debts.<sup>(r)</sup> The holder by conveyance or bequest of one partner's share of the lands of the firm must pursue his remedy for their possession by suit in equity.<sup>(s)</sup> The possessor of the legal title in such case holds it in trust for the purposes of the partnership.<sup>(t)</sup> A judgment against a partner individually is a lien on the real estate held by the firm, subject, however, to the payment of the firm debts and the equities of the other partners.<sup>(u)</sup> Where a partnership is still in existence, one partner cannot mortgage the stock under his control to secure his individual debt.<sup>(v)</sup>—ED.

(n) *Aultman v. Fuller*, 53 Iowa, 60.

(o) *New Orleans v. Gauthereaux*, 32 La. Ann. 1136.

(p) *McKenna's Estate*, 11 Phila. 84.

(q) *In re Coddling & Russell*, 9 Fed. Rep. 849.

(r) *Shanks v. Klein*, 11 Fed. Rep. 767.

(s) *Young v. Dunn*, 10 Fed. Rep. 717.

(t) *Shanks v. Klein*, 11 Fed. Rep. 767.

(u) *Johnson v. Rogers*, 15 N. B. R. 1.

(v) *Moline Wagon Co. v. Rummell*, 12 Fed. Rep. 653.

## THOMAS v. TOWN OF LANSING.

(Circuit Court, N. D. New York. September 6, 1882.

### 1. TOWN BONDS IN AID OF RAILROADS—POWER TO ISSUE.

Where an act of the state legislature provided that any town, village, or city in any county through or near which a certain railroad or its branches may be located, except such counties, towns, and cities as are excepted from the provisions of the general bonding law, may aid or facilitate the construction of the said railroad, *held*, in an action on coupons from bonds issued by a town in aid of an extension of such railroad, that the location of the route of the whole extension must be made by the board of directors of the road, and the two *termini* fixed and ascertained pursuant to law, before a town was empowered to issue bonds in aid of its construction.

### 2. SAME—DESIGNATION OF ROUTE.

Where the determination of the question of location of the route and *termini* of the extension had been confided to the board of directors of the railroad extension by the statute authorizing the construction of the road, it was not the province of the town commissioners to determine it; and, although the county judge could designate the commissioners who should issue the bonds, yet he could not designate the municipality, nor could he designate the commissioners until after the board of directors had designated the municipality.

## 3. SAME—BONA FIDE PURCHASER NOT PROTECTED.

Where a town had no power to issue bonds in aid of a railroad extension, there can be no protection of the holder of such bonds as an innocent purchaser, and no ratification of a power that never existed can aid him, although the bonds are regular on their face and recite that they are issued "under the provisions" of an act of the legislature, and specify the act, and although he took them otherwise *bona fide*.

## Motion for a New Trial.

*James R. Cox and Sprague, Milburn & Sprague*, for plaintiff.

*H. L. Comstock and Hurlbut & Underwood*, for defendant.

BLATCHFORD, Justice. This is a motion for a new trial. The case was tried by the court without a jury, and, on the findings of fact, a judgment was ordered for the defendant. 11 FED. REP. 829.

The question on which the case turns is as to the power of the town to issue the bonds. The power, if it existed, arises out of the provisions of section 1 of the act of the legislature of the state of New York passed April 5, 1871, (Laws New York, 1871, vol. 1, c. 298, p. 586,) which enacts as follows: "The New York & Oswego Midland Railroad Company are hereby authorized and empowered to extend and construct their railroad from the city of Auburn, or from any point on said road easterly or southerly from said city, upon such route and location, and through such counties, as the board of directors of said company shall deem most feasible and favorable for the construction of said railroad, to any point on Lake Erie or the Niagara river." Then follow provisions for constructing other branches. Then follows this: "And any town, village, or city in any county through or near which said railroad or its branches may be located, except such counties, towns, and cities as are excepted from the provisions of the general bonding law, may aid or facilitate the construction of the said New York & Oswego Midland Railroad, and its branches and extensions, by the issue and sale of its bonds in the manner provided for" in the act of April 5, 1866, (Laws of New York, 1866, vol. 1, c. 398, p. 874,) and the acts "amendatory of and supplementary thereto." The manner so provided for is the appointment, by the county judge of the county in which the town is situated, of not more than three commissioners to carry into effect the purposes of the act. The commissioners are to execute the bonds under their hands and seals, and to issue them. When issued lawfully, they become the obligations of the town, and bonds issued by the town.

The bonds in the present case state on their face that they are obligations of the town, and that they are "issued under the provisions" of the said act of 1866, and "the several acts amendatory

thereof and supplementary thereto," especially the said act of 1871. They are dated December 1, 1871, and purport to be attested by the hands and seals of three persons as "duly-appointed commissioners of said town of Lansing;" and the bonds state that the commissioners have caused each of the annexed coupons to be signed by one of their number. This suit is on coupons amounting to \$3,220, cut from bonds, the principal of which amounts to \$7,500.

The commissioners were appointed October 21, 1871, by the county judge of Tompkins county, and took the oath of office on the first of November, 1871. On the sixteenth of November, 1871, the board of directors of the railroad company passed the following resolutions:

"Whereas, the New York and Oswego Midland Railroad Company had for its original object the construction of a railway from the city of New York to the city of Oswego; and whereas, since the organization of said railway company it has become desirable to extend their said railroad to Lake Erie, or the Niagara river; and whereas, the legislature of the state of New York did, by chapter 298 of the Laws of 1871, authorize and empower the said New York and Oswego Midland Railroad Company to build and extend their said railroad from the city of Auburn, or from any point easterly or southerly of said city, to any point on Lake Erie or the Niagara river; and whereas, the said railroad company and its board of directors have decided to begin such extension and construction of said railroad westerly at and from the village of Cortland, in the county of Cortland, and westerly to Lake Erie or the Niagara river; therefore, be it

"Resolved, that the board of directors of said railroad company hereby determine that the construction and extension of the said railroad westerly commence at and from the village of Cortland, in the said county of Cortland, and thence to Lake Erie or the Niagara river."

On the same day the board of directors of said company passed the following resolution:

"Resolved, that the said New York and Oswego Midland Railroad Company, for the purpose of obtaining money and materials necessary to extend their said railroad from the village of Cortland to Lake Erie or the Niagara river, hereby authorizes and directs its president and treasurer to borrow money to an amount not exceeding \$25,000 per mile in length of the track of the said railroad, so as aforesaid to be extended and constructed, and, to secure the repayment thereof, to issue its first-mortgage bonds, to be made payable in gold coin of the United States, and to be of such denomination, and after such manner and form, and to such trustees, as the said president may determine upon, and deem best for the interest of the said company."

It is not shown that the board of directors of the company ever passed any resolutions except the foregoing, or took any action as such board, except what is contained in the foregoing resolutions, in



respect to said extension, until after the bonds involved in this suit were issued.

On the first of January, 1871, the executive committee of the company had purchased a railroad road-bed called the Murdock line, 16 miles long, with its franchises and right of way, which had been graded in 1852, and part of which was ready for ties and ballasting, the grading, however, being grassed over and the culverts decayed. It ran from a place called Osmun's, in the town of Lansing, northward, to the north line of that town, which is the north line of Tompkins county and the south line of Cayuga county, and then on through the towns of Genoa and Venice, in Cayuga county, into the town of Scipio, in that county. During the fall and summer of 1871 the company made surveys for a line of railroad, to run from Freeville, in the town of Dryden, Tompkins county, (the town next north of Lansing,) northward to Osmun's, a distance of 10 miles. The grading and making of the railroad from Freeville, north, through the town of Lansing, was begun in December, 1871. On December 13, 1871, a map called "Map No. 1," certified by the directors of the company, was filed in the office of the clerk of Tompkins county, containing this inscription: "Map and profile of a part of the Auburn branch of the New York and Oswego Midland Railroad, as located in and through a part of the county of Tompkins, New York." This map covered the 10 miles from Freeville to Osmun's. On the twenty-second of December, 1871, there was filed in the same office a map similarly certified and inscribed, called "Map No. 2," and covering the Murdock line from Osmun's to the north line of the town of Lansing. On the twenty-third of December, 1871, there was filed in the office of the clerk of Cayuga county a map similarly certified, called "Map 1," containing this inscription: "Map and profile of a part of the Auburn branch of the New York and Oswego Midland Railroad, as located in and through a part of the county of Cayuga, New York," and covering the Murdock line from the north line of the town of Lansing, through the towns of Genoa and Venice, to the south line of Scipio. On the thirty-first of January, 1872, \$15,000 of bonds were issued, and in August, 1872, \$60,000 were issued. No more were ever issued. When the bonds involved in this suit were issued does not appear. In exchange for said bonds the commissioners received a certificate for 750 shares of the capital stock of the railroad company, of \$100 each, in the name and on behalf of the town of Lansing. On the thirtieth of May, 1872, there was filed in the office of the clerk

of Cayuga county a map called "Map No. 2," certified by the said directors, containing the same inscription as the said "Map 1," and covering the Murdock line from the south line of Scipio to the Merrifield road, in Scipio, which was the north end of the Murdock line. The Utica, Ithaca and Elmira Railroad Company owned a railroad which was running from the village of Cortland to the village of Freeville, west from Cortland, a distance of about 10 miles. Under a contract or arrangement between that company and the Midland Company, the latter began, in the fall of 1872, to run its own cars from Cortland to Freeville, and then on its own road from Freeville to Scipio, 26 miles, the latter road having been completed. The terminus in Scipio was 11 miles from Auburn, in a farming community, and was never connected with any other road until 1881, when it was finished to Auburn by another company. On the twenty-ninth of January, 1873, the following proceedings took place at a meeting of the board of directors of the Midland Company: "The president presented the contract made by the executive committee with Charles P. Wood, of Auburn, dated January 1, 1871, for the road-bed and franchises known as the Murdock line. On being read and discussed J. W. Merchant offered the following:

'Resolved, that the contract made by D. C. Littlejohn, J. W. Merchant, John R. Clark, Cheney Ames, and William Foster, as the executive committee, and Charles P. Wood, of Auburn, for the purchase of the franchises, right of way, and road-bed known as the Murdock line, be and the same is hereby approved, ratified, and confirmed. Resolved, that the action of the president in locating and constructing the western extension of this company's road over and upon the said Murdock line be and the same hereby is approved.' Unanimously adopted."

The persons named were all or a majority of the executive committee. On the twenty-ninth of August, 1873, there was filed in the office of the clerk of Cayuga county a map called "Map 3," certified by the said directors, containing this inscription: "Map and profile of a part of the western extension of the New York and Oswego Midland Railroad, as located in and through a part of the county of Cayuga," and covering a line from the said Merrifield road to Mud Lock, a point in Cayuga county 10 miles northwest of Auburn, on the eastern line of Seneca county, the county next west of Cayuga county, and about 50 miles from Freeville. The company continued its efforts after the fall of 1872 to extend its railroad westward, until, embarrassed by the financial troubles of 1873, it failed and discontinued operations, and its property passed into the hands of a receiver,

from which condition it has never recovered. It never located or built any line of road of its own between Cortland and Freeville. The \$75,000 of bonds were delivered by the commissioners to Charles P. Wood, the assistant treasurer of the company. The plaintiff became a *bona fide* purchaser of the \$7,500 of bonds, and of the coupons thereon which are in suit. The commissioners paid the interest which became due on all of the bonds on September 1, 1872, being the first installment, and nearly all which became due on them on March 1, 1873, and September 1, 1873, having received the money to do so from the collector and supervisor of the town of Lansing, collected in the usual manner, as provided by said acts, but since that time they have not paid any more, nor have any funds been provided for that purpose. They have retained the certificate of stock. On the foregoing facts it was held—

(1) That the statutes prior to the act of 1871 conferred no power to issue the bonds, because the counties through which the branch road to Auburn was to run, as provided by acts passed in 1867 and 1869, were named in the statute, and Tompkins was not one of them, and such branch road was not to pass through or near the town of Lansing; (2) that, under the act of 1871, no power was conferred on any town to issue bonds in aid of the Midland Company until the whole of the western extension provided for in that act should be located by some definite action by the company, and, irrespective of the said maps and profiles, there remained about 140 miles more to be located between Mud Lock and Buffalo or the Niagara river, which, so far as appeared, was never located at all; (3) that payment of the interest, and receiving and retaining the certificate of stock, might be a ratification of steps in regard to which merely irregularity was claimed, but could not avail to prevent the town from setting up a total want of power to issue the bonds.

Taking all the provisions of the act of 1871 together, it seems to be very plain, that the legislature, instead of designating any county or town from which the western extension was to start, or any counties or towns through which its route should lie, or any county or town which should be its western terminus, left all those matters open to be determined by the board of directors of the company, and required the board to determine all those matters, and to determine them by certain prescribed principles. It required the board, if it should construct the extension, to first determine what route it should deem most feasible and favorable for the construction of the whole extension, the starting point, the route, and the western terminus being all left to depend on what was most feasible and favorable. A choice was given to start from Auburn, or from any point on the existing road easterly or southerly from Auburn, and to end at any point on

Lake Erie or the Niagara river. This gave an option over a wide extent of country from north to south. Even adopting the village of Cortland as the eastern starting point did the same. If the branch should be located through Tompkins county without reference to any route beyond Tompkins county in either direction, it might well be that thereafter, with a view to the rest of the route, a route through Tompkins county would not be at all a feasible or favorable route, in the judgment of the board, for reaching Lake Erie or the Niagara river, and that a location abandoning Tompkins county and abandoning even a starting at the village of Cortland would have to be resorted to, involving a starting point, a route, and a western terminus in respect to which it could not fairly be said that Tompkins was a county near the road, and which would be such that the requisite number of tax-payers would never consent to bond the town to aid in constructing the branch. The resolution of November 16, 1871, merely fixed the eastern point. The board of directors were to determine not only that matter, but also the most feasible and favorable route for reaching such western terminus as they should select as most feasible and favorable. The resolution was incomplete. It was a snare and a delusion. The expression "may be located," in the clause in the statute giving power to towns to aid the construction of the extension, has reference to the word "location" in the first clause of the same section. It means "may have been located in a location of the route of the whole extension." There was nothing in any of the maps filed in either Tompkins county or Cayuga county before the bonds were issued, which indicated that the board of directors intended the road between Freeville and the Merrifield road in Scipio to be a part of the western extension. It was called, in all of those maps, "the Auburn branch," and was so called by the directors, by their certificate on each map. It was not the Auburn branch or the branch to Auburn authorized by the acts of 1867 and 1869 to be made through the counties of Chenango, Madison, Cortland, and Cayuga. It was, in fact, a branch without authority of law. The idea of regarding the Murdock line as a part of the western extension does not, so far as appears from anything shown, seem to have been entertained by the board of directors until January 29, 1873, when the resolution of that date was passed. The map filed in Cayuga county August 29, 1873, called the continuation from the Merrifield road to Mud Lock a part of the western extension. But there is nothing of record showing that the 10 miles from Freeville to the Murdock line was ever called by the board of directors a part of the western extension. The case

is one of the absence of legislative authority, because there was no designation of Tompkins county, either directly by name in the statute, or by any delegated authority, as a county the towns in which could issue bonds in aid of the western extension. Every one taking the bonds was notified by the face of them of the act of 1871. Even a *bona fide* purchaser of them was referred to the source of authority. It was not found directly in the statute, and he was remitted by that to the action of the "board of directors" as to the counties through which the route and location of the road were to be fixed. The foregoing views, as to the proper construction of the act of 1871, are those which were held by the court of appeals of New York in *People v. Morgan*, 55 N. Y. 587. The case stands as if there were no act, or as if the act provided that it should not take effect until the happening of an event which had not yet happened.

But the question arises whether, in view of the recitals in the bonds, which recitals were made by the commissioners as officers of the town, and of the fact that plaintiff is a *bona fide* holder of the bonds and coupons, and of the payment of the interest, and of the retention of the stock certificate, or of all or any of these circumstances, the town is estopped from asserting that the board of directors of the company never took the action made necessary by the act to fix the route and location of the branch.

It is contended for the plaintiff that the ascertainment of the facts conferring power on the town to issue the bonds was confided by law to the commissioners who issued them; that the bonds are regular on their face, and recite that they are issued "under the provisions" of the act of 1871; that that is a declaration by the commissioners, in the bonds, that the route and location of the road were fixed by the board of directors in such manner that the town had the right, under some circumstances, to issue the bonds; and that, therefore, they are valid in the hands of a *bona fide* holder of them. It is also urged, that whenever the company has constructed any railroad which might be a part of a road provided for by the act of 1871, the presumption, in a collateral suit like the present, is, that it has been lawfully built, and that all the proper steps legally necessary for its construction have been taken; that the word "location," in the act, is a synonym for the word "place;" that, when a road has been built or acquired upon any route or location, the presumption is that such route or location has been deemed most feasible and favorable for its construction; that it is sufficient if the court finds the company constructing, occupying,

or operating such portion of a road as is through or near the town of Lansing; that the purchaser of the bonds is only required to ascertain that a branch or extension of the road is in fact situated or placed through or near the town which issues the bonds; that it is enough if the road is found constructed through or near the town of Lansing, between a point east or south of Auburn and a point on Lake Erie or the Niagara river, on any possible route between those points; that it was for the town of Lansing to decide whether the road in question was located through it, or sufficiently near to it to justify the issue of the bonds; that it made that decision affirmatively, and announced it by declaring on the face of the bonds that they were issued "under the provisions" of the acts referred to in the bonds; and that the town is, therefore, estopped, as against a *bona fide* purchaser of the bonds, from asserting that there was not a sufficient "location," under the statute.

The case is sought to be brought within those numerous cases in the Supreme Court of the United States, where, the legal power being sufficiently comprehensive, the *bona fide* holder has a right to presume, from the recitals in the bonds, and the fact of their issue by the officers charged with the duty of issuing them, that all precedent requirements prescribed by law have been observed. But, in those cases, the municipality was designated by name in the statute, or all the towns in certain designated counties were authorized to issue bonds, or the authority was given to all the towns on or near a route which had been designated by some record, or there was something equivalent to such a designation of the municipality. In the present case, however, on all the facts existing when these bonds were issued, the power to issue bonds in aid of this road, under the act of 1871, might as well have been exercised by any town, village, or city in the state west of Auburn, or west of any point on the road of the company easterly or southerly from Auburn, as by the town of Lansing. Certainly, the legislature did not, in the act of 1871, use language indicating such an intention. It clearly, by the language it used, intended to have the two *termini*, and the route and location of the road, determined by the board of directors with a view to what was most feasible and favorable for its construction, before the taxpayers of the town could be called upon to act on the question of consent to bonding the town. The determination of this question being confided to the directors, it was not the province of the commissioners or of any one else to determine it. The question in issue in this suit is not as to the regularity of the exercise of

a power plainly conferred on, and capable of being exercised by, the commissioners of this town. The county judge could designate the commissioners, but he could not designate the municipality. He could designate the commissioners only after the board of directors had designated the municipality. No certificate by the commissioners that the board of directors had designated the municipality could make such designation a fact, when it was not a fact. Every taker of the bonds had notice from them that the act required the designation by the board of directors, and, if there was no such designation in fact, there was none as to such taker, though he took otherwise *bona fide*, and the absence of such designation was the absence of power in the town to issue the bonds under any circumstances.

The present case falls within the principles adjudged in *Marsh v. Fulton Co.* 10 Wall. 676, because the power of the town to contract never existed. In such a case there can be no protection of the holder as an innocent purchaser, and no ratification of a power which never existed, by such alleged acts of ratification as are shown in this case. *East Oakland v. Skinner*, 94 U. S. 255, 258; *South Ottawa v. Perkins*, Id. 260, 269; *McClure v. Oxford*, Id. 429; *Ogden v. Daviess Co.* 102 U. S. 634, 641; *Buchanan v. Litchfield*, Id. 278.

The plaintiff can derive no aid from the fact that the decision of the supreme court of New York in the case which the court of appeals decided in 55 N. Y. was contrary to that of the latter court. The decision of the supreme court of New York was an appealable decision, and was appealed and reversed. All persons who relied on the decision by the supreme court of New York took the risk of a decision the other way, on appeal, in the same suit.

It results from the foregoing considerations, that the motion for a new trial must be denied, and the same decision is made in the case of Mellen against the same defendant.

## MERRILL v. TOWN OF MONTICELLO.\*

(Circuit Court, D. Indiana. December, 1882.)

## 1. MUNICIPAL BONDS—POWER TO ISSUE.

Municipal corporations have no general power to issue commercial paper; such power must be derived from legislative authority.

## 2. PURCHASERS OF—MUST TAKE NOTICE.

Where bonds, on their face, recite that they are "funding bonds," and issued to fund the town's indebtedness, purchasers assume, at their peril, that the legislature had authorized the issue of bonds for that purpose.

## 3. DEFENSES.

No such power having been granted by the legislature, purchasers, notwithstanding the form of the bonds, hold them as non-negotiable paper, and subject to all legal and equitable defenses in favor of the maker.

## 4. ANSWER.

An answer which avers that the bonds were issued without legislative authority in that behalf, and that the town did not get the proceeds of the same, and did not derive any benefit therefrom, *held* good on demurrer.

The case of *Ragan v. City of Watertown*, 30 Wis. 259, distinguished from the case at bar.

*Roach & Lamme*, for plaintiff.

*David Turpie* and *W. E. Uhl*, for defendant.

GRESHAM, D. J. On the twentieth day of May, 1878, the town of Monticello made and issued a series of coupon bonds, each for \$100, and amounting in all to \$21,000, payable in gold, to bearer, at New York, in 10 years, with interest at the rate of 7 per cent. per annum, in gold, at the same place. The principal of each bond was to become due and payable, at the option of the holder, on the non-payment of any coupon thereto attached, for 90 days after maturity. The words "funding bonds of the town of Monticello" conspicuously appear at the top of each bond, and each recites that "this bond is one of a series of \$21,000 authorized by the said town by an ordinance passed by the board of trustees thereof on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of said town." The coupons numbered 2, attached to each bond, were presented at the proper place, at maturity, and payment was refused. The plaintiff, as holder of the entire series, thereupon elected to declare the principal sum due, and brought this suit.

The amended answer avers that on the twenty-fourth day of January, 1869, a petition was presented to the board of trustees of the town, by the school trustees, for the issue of bonds to build a school-house, and on the same day the town trustees passed an ordinance

\*Reported by Charles H. McCarer, Asst. U. S. Atty.



directing that there be issued to the school trustees \$20,000 worth of coupon bonds, in denominations of \$100 each, drawing interest at the rate of 10 per cent. per annum, payable annually; that on the first day of May, 1869, the town issued its bonds under this ordinance, amounting to \$20,000, payable in 20 years; that these bonds, representing the sole indebtedness of the town at the time of their issue, are, as to the principal thereof, outstanding and unpaid obligations; that on the eleventh of May, 1878, the owners of the taxable property of the town petitioned the board of trustees of the town to contract a loan of \$21,000 for the purpose of paying its indebtedness; that on the same day the board passed and entered of record the following ordinances:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, that said town issue bonds in the sum of \$21,000, in denominations of \$100, bearing interest at the rate of 7 per cent. per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained, that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale; and further, that said bonds shall not be sold for less than 94 cents on the dollar."

—That on the twentieth day of May, 1878, the trustees issued the coupon bonds of the town to the amount of \$21,000, bearing interest at the rate of 7 per cent. per annum, payable annually, and maturing as to principal in 10 years; that after their issue these bonds, which are the bonds sued on, were delivered to J. C. Wilson, for sale, who sold the same and converted the proceeds to his own use, the town deriving no benefit therefrom, and that at the time such bonds were issued the defendant was an incorporated town, containing not more than 1,300 inhabitants.

The legislature, by an act passed in 1852, provided for the incorporation of towns, and defined their powers. This act authorized debts to be contracted for the usual municipal purposes. Section 27 (Rev. St. § 3342) reads thus:

"No incorporated town under this act shall have power to borrow money, or incur any debt or liability, unless the citizens, owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan; and such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same; and for any debt contracted thereby, the trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the accrued interest on such debt or loan, with an addition of not less than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal thereof."

This section granted no power to contract debts or to fund indebtedness. It simply prescribed the mode in which the power elsewhere granted was to be exercised, and it was therefore a limitation upon that power. By acts subsequently passed, and in force in May, 1878, towns were authorized to contract debts in the purchase of ground and the erection thereon of school buildings, and to aid in the construction of gravel roads, and for some other purposes. But the powers granted by these acts were to be exercised under clearly-defined restrictions and limitations as to amount, time of payment, rate of interest, etc., and taxes were required to be levied, as in the section above quoted, for the prompt payment of the accruing interest, and the principal at maturity. Obviously it was not intended that indebtedness contracted under these acts should be renewed by issuing funding bonds or otherwise. If there was authority for the issue of the bonds of May, 1878, then the restrictions imposed by the legislature on the exercise of the power to contract debts were of no avail.

The common councils of cities were authorized, by acts passed in February, 1877, to fund their indebtedness. Rev. St. 632, 633. These acts applied to cities only. It was not until March 7, 1881, that an act was passed authorizing cities *and towns* to fund their indebtedness with bonds at par, drawing not more than 6 per cent. interest. The bonds in suit recite that they were issued to fund the town's indebtedness, and purchasers assumed, at their peril, that the legislature had authorized the issue of bonds for that purpose. No such power had been granted, and whether these bonds were intended to take the place of the outstanding series of 1869, or for some other indebtedness, notwithstanding their form, they were taken as non-negotiable paper, and subject to all legal and equitable defenses in favor of the maker. Municipal corporations have no general power to issue commercial paper. *Hopper v. Town of Covington*, 8 Fed. Rep. 777.

The demurrer to the amended answer was argued by counsel on both sides on the theory that the indebtedness to be funded was the outstanding bonds of 1869.

*Rogan v. City of Watertown*, 30 Wis. 259, was a suit on coupons attached to bonds which had been voted in aid of a railroad. The third paragraph of the complaint seems to have been upon a coupon which had been attached to a substituted bond. This bond corresponded in number, amount, time of payment, rate of interest, and in all other respects with the bond which was surrendered and canceled at the time of the substitution. This was a mere irregularity,

and the substituted bond was held valid. The case differs widely in its facts from the one at bar. If the town had got the proceeds of the bonds sued on, or had derived any benefit therefrom, the plaintiff would have a much stronger case.

Demurrer overruled.

### PRINCE V. ROBINSON'S ADM'RS.\*

(Circuit Court, D. Colorado. October Term, 1882.)

#### EXECUTORY CONTRACT—DEATH OF PARTY THERETO—EFFECT OF

On the fifth day of March, 1880, George B. Robinson executed and delivered to plaintiffs' assignor options for stock as follows: "For value received, D. F. Verderal may call on me for 500 shares of the capital stock of the Robinson Consolidated Mining Company, at five dollars per share, at any time until January 1, 1881. The bearer is entitled to all dividends declared during the time. [Signed] G. B. ROBINSON." Upon the contracts were imprinted words signifying that they were redeemable at the American Exchange National Bank, New York. Robinson died early in December, 1880. After his death, and within the time prescribed in the contracts, but before administration on the estate of Robinson, plaintiff appeared at said bank, demanded the stock, and tendered payment therefor, which was refused. After letters of administration plaintiff sues, etc. *Held*, that the agreements were merely executory, and no right to action had accrued thereon at the time of Robinson's death. At that time something remained to be done by both parties. One of them having become incapable of acting, it follows that the agreement could not be executed until administrators were appointed. The administrators are not bound, no demand having been made on them within the time limited by the contract, or at any time.

On Motion to Set Aside Verdict for Defendants, and Enter Verdict for Plaintiff.

*Willard Teller*, for plaintiff.

*G. G. Symes*, for defendants.

HALLETT, D. J. This suit against the administrators of George B. Robinson, deceased, is brought on two contracts executed by Robinson, in his life-time, to D. F. Verderal and L. L. Verderal, and by them assigned to plaintiffs.

The first of these contracts is as follows:

"NEW YORK, March 5, 1880.

"For value received, D. F. Verderal may call on me for 500 shares of the capital stock of the Robinson Consolidated Mining Company, at five dollars per share, any time until January 1, 1881. The bearer is entitled to all dividends declared during this time.

"Expires December 31, 1880.

G. B. ROBINSON."

\*From the Colorado Law Reporter.

And the second is for the same number of shares, and in the same words, except the name of the promisee. At the time the contracts were executed, words were impressed thereon, signifying that they were redeemable at the American Exchange National Bank, New York city, and it is conceded that they were payable at that place. Robinson died early in December, 1880, before the expiration of the time in which the stock could be demanded, and soon thereafter, and during the same month of December, plaintiff called on the bank for the stock, offering to pay the price mentioned in the agreement. The officers of the bank refused to deliver the stock or accept the money, saying, in substance, that by the death of Robinson their authority to act was withdrawn. At that time letters of administration on the estate of Robinson had not been issued. Defendants were appointed to be administrators in January, 1881, and about the twentieth of that month tendered the stock to plaintiff, and plaintiff refused to accept it. The stock had then declined below the price mentioned in the agreement.

No question is presented as to the character or validity of the contracts. But the point in dispute is as to the sufficiency of the demand for the stock at the bank, after the death of Robinson, and before administrators of his estate were appointed.

It will be observed that the agreements were executory, and no action had accrued thereon at the time of Robinson's death. The demand necessary by the terms of the agreements to secure the stock, or damages for the failure to deliver it, had not then been made, and it was uncertain whether such demand would be made. These agreements, usually called options, giving the promisee a right to call for stock, leave the whole matter in his election, so that it is impossible to say that they will ever be executed. Clearly enough, there was no right of action in plaintiff, on these agreements, against Robinson in his life-time, and if not against him, in what manner shall it be said that the action may arise against his personal representatives? As something was yet to be done by both parties to the agreements, and one of the parties had become incapable of action, it would seem to follow that the agreements could not be executed, nor could there be a default in executing them without some one to represent the deceased party. A demand was to be made for the stock. Of whom? Not of Robinson, he being dead; but of some one having authority to represent his estate. The money was to be paid for the stock, not to Robinson, but to his personal representatives. These things could not be done until administrators of the estate should be appointed,

for the reason that, in so far as they were to be done by Robinson, there was no one to act. It is not the case of a contract fully executed by the survivor, leaving only a duty to be performed by the deceased; as where one sells property and receives the consideration, and dies; or borrows money, and dies before repaying it. In this instance, something was to be done by plaintiffs and by Robinson which had not been done at the death of the latter. In other words, the contracts were executory at Robinson's death, and to proceed in the execution of them, or to declare a breach of them, in the absence of the representatives of the estate, is, in the nature of things, impossible. Not having called the stock in the life-time of Robinson, plaintiff was bound to demand it of the administrators, and as the demand was not made, there is no right of action. The point that the death of Robinson did not dissolve the contracts, or absolve his estate from liability, which was much pressed in argument, may be conceded. But that is not the matter in issue. In respect to the unsettled affairs of deceased persons, the law can do no more than to appoint a living representative for the deceased, and bind him to fulfill the latter's obligations to the extent of the assets in his hands. In doing so, loss must often ensue, for which there is no remedy.

The circumstance that a place for delivering the stock and receiving the money was specified, is of no weight. Whether the contracts are to be understood as requiring Robinson to be present at the bank to fulfill them, or to appoint the bank, or some other person, to act for him, the result is the same. In any case, he was incapable of acting in person, or by agent, at the time the stock was demanded, and no demand on him at the bank or elsewhere would be effectual. As the administrators were not then in authority, a demand on them could not be made. And so it turns out that plaintiffs' proceeding in that behalf was entirely nugatory.

The motion will be denied.

**NEWMAN and others v. NEWTON and others.\***

*(Circuit Court, D. Colorado. October Term, 1882.)*

**1. AFFIRMATIVE MATTER IN ANSWER—REPLICATION.**

In ejectment for a mining claim, where defendant sets up title in himself, the plaintiff must reply.

**2. COURT CANNOT VACATE JUDGMENT AFTER TERM.**

After the term has closed, the court has no power, without the consent of parties, to vacate a judgment. A stipulation consenting to vacate within a certain time is wholly inoperative after the time specified has elapsed.

**3. FINAL JUDGMENT.**

A judgment for defendants, for want of replication to answer, is a final judgment.

**Motion to Vacate Judgment.**

*Charles J. Thompson*, for plaintiffs.

*L. S. Dixon*, for defendants.

**HALLETT, D. J.** Ejectment in the district court of Lake county to recover the Jessie Clark lode; thence removed into this court. Answer filed in this court May 12, 1880, denying plaintiffs' title to the Jessie Clark lode, and setting up title in the defendants to the same ground as the Virginus lode. Under section 250 of the Code of Civil Procedure, the claim of a defendant in ejectment to the premises in controversy, under a location differing from that from which plaintiff derives title, is regarded as new matter, requiring a replication. After providing that a defendant may deny the allegations of the complaint, or disclaim any interest in the premises, the section declares that "the answer may also state generally, as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right of possession or occupancy he claims."

This serves to bring into the case new facts, requiring a denial from the plaintiff, and, if not denied, they are, by section 72 of the Code, to be taken as true. In that view, and according to the practice of the court, on the sixth day of July, 1880, nearly two months after the answer was filed, defendants took judgment against plaintiffs for want of a replication. This was at the May term, 1880, of the court, which was adjourned July 10th of that year. After the court adjourned for the term, and on the nineteenth day of July, 1880, the counsel who had obtained the judgment entered into a stipulation with counsel, representing the plaintiffs, to the effect that

\*From the Colorado Law Reporter.

the judgment should be set aside on some rule-day, or on the first day of the next term of the court, with leave to plaintiffs to reply to the answer; and the stipulation was filed in the cause.

It is said that at the time judgment was entered one of the counsel for defendants, Mr. Bates, had agreed with plaintiffs' counsel, Mr. Thompson, to give further time for filing a replication to plaintiffs' answer; and Mr. Green, who was also counsel for defendants, in ignorance of that agreement, took judgment against plaintiffs. These circumstances led to the stipulation before mentioned. The judgment was not, in fact, set aside at the time specified in the stipulation, or at any time; and defendants have now discharged Mr. Green from the case, and refuse to be bound by the stipulation. But that is not important, as the time within which it was to be executed has passed.

Without consent of parties, it is believed that the court has no power to vacate a judgment after the term has passed in which it was entered. *Bank of U. S. v. Moss*, 6 How. 31; *Assignees of Medford v. Dorsey*, 2 Wash. 433; *Becker v. Sauter*, 89 Ill. 596.

Defendants' agreement to open the judgment was probably subject to be revoked at any time before it should be executed. But, at all events, it was not executed within the time specified, and it is not now of any force or effect.

If it is thought that the proceedings of this court may be subject to the provisions of section 75 of the Code, by which a person may obtain relief from a judgment entered against him "through mistake, inadvertence, surprise, or excusable neglect," it will be seen that the limitation of five months, within which the motion must be entered, has passed. The suggestion that the judgment in this case was not final, cannot be entertained. It is as final and conclusive of the rights of the parties as any which can be given in an action of this kind. The court is without power to give relief in this form at this time, and the motion will be denied.

## TABOR v. BIG PITTSBURG CONSOLIDATED SILVER MINING CO.\*

(Circuit Court, D. Colorado. January 3, 1883.)

## ATTACHMENT—DOES NOT LIE IN ACTIONS OF TRESPASS.

Under the statute of Colorado an attachment is not allowed in actions of trespass to mines, even though the plaintiff elect to waive the trespass and sue as for money had and received by defendant to his use. The implied promise in such case is a pure fiction of the law, invented to support the old action of *assumpsit*. Taking ore from a mine without the consent of the owner is a trespass in which none of the elements of a contract can be found

On Motion to Quash Attachment.

L. C. Rockwell, for plaintiff.

S. P. Rose, for defendant.

HALLETT, D. J. The substance of the complaint is that the defendant has entered the Matchless mine in Lake county, which is owned by plaintiff, and has taken therefrom ore of the value of \$109,388, and has sold and converted the same to its own use. The fourth paragraph of the complaint is as follows:

"That plaintiff now elects to waive the trespass so as aforesaid committed by defendant in mining and getting said ore, dirt, and mineral-bearing rock from said Matchless lode, mine, and premises, and sues defendant, in an action for money had and received for plaintiff's use, for the money received by defendant for said ore, dirt, and mineral-bearing rock so as aforesaid dug, mined, and got out of said Matchless lode of defendant, and by it sold and converted into money and money's worth."

Suit was brought in the district court of Lake county on the first day of August, 1881, and on the fifth day of the same month the attachment was sued out against which the present motion is directed. The motion was, however, filed in the district court of Lake county, August 13, 1881, and within the time limited for answer, as provided in section 113 of the Code of the state. The motion was not decided in the state court, and the cause having been removed into this court very recently, it remains for consideration here. The statute of Colorado gives the writ of attachment in actions on contracts express or implied, (Code, § 91,) and the question is whether this action is of that character. Taking the ore from the Matchless mine without the consent of the owner was certainly a trespass in which no element of a contract can be found. But it is said that the plaintiff may waive the trespass and sue for the proceeds of the ore as money due on contract. And that proposition is everywhere ad-

\*From the Colorado Law Reporter.



mitted. Indeed, some courts go further, and say that an action for the value of the property tortiously taken, as for money had and received, may be maintained when the property has not been converted into money. *Norden v. Jones*, 33 Wis. 600. Compare *Moses v. Arnold*, 43 Iowa, 187.

The promise to pay the value of the property or the money received for it in such cases, which gives to the transaction the quality of a contract, is, however, a pure fiction supplied by law to support the action. As it was invented to support the action of *assumpsit* in the old procedure, and the forms of action have been abolished, a learned author suggests very forcibly that it should not be recognized in modern practice. Bliss, Code Pl. §§ 128, 152, *et seq.*

And there are reasons for believing that the statute governing attachments refers only to contracts existing within the intention of the parties making them. The conduct of parties is often such as to give form to an agreement or understanding which they do not express in words, but fully intend to carry out; as where one takes an article of merchandise from a store in which he usually deals, with the assent of the owner, but without words, the intention to buy the article at the current price is fully understood, although not expressed. The statute may be taken to refer to such implied contracts, more than to others, which were invented to support a form of action in the common-law procedure.

Plaintiff's counsel presented many cases to show that an action *ex contractu* may be brought for property tortiously taken; but none of them affirm the right to an attachment for the same cause, except in states where the acts in terms extend to torts. *Graves v. Strozier*, 37 Ga. 32; *Davidson v. Owens*, 5 Minn. 50.

If the acts of the several states allowing the writ of attachment in actions on contract have been held to embrace cases which really sound in tort, like the one at bar, there should be something in the reports on the subject. But no case has been cited to support that view; and the court has found but one case of an attachment maintained upon a contract which may be said to be a clear implication of law, and that one may be assigned to the class of tacit agreements already mentioned, which, if not expressed in words, are evincible from the acts of the parties, and stand fully with their intention. In that case money was advanced on an agreement to construct certain machinery, which agreement was not performed, and it was thought that the money so advanced might be recovered by attachment, under a statute which allowed the writ in an action "upon a contract

expressed or implied for the direct payment of money." *Peat Fuel Co. v. Tuck*, 53 Cal. 304.

In the same state it was held that attachment would not lie for money lost at play by plaintiff's clerk. *Babcock v. Briggs*, 52 Cal. 502.

If, however, the meaning of the attachment act on this point is doubtful, it is believed that the course of legislation on the subject will afford the means of resolving the doubt. In 1872 the legislature of the territory, in an act "defining further causes for attachment," gave the writ in actions "to recover damages for trespass on any lode or mining property." Ninth Sess. Territorial Assembly, 116. In 1876 amendments were made in the attachment act, in the course of which the legislature declared that nothing therein should affect the prior act of 1872. Eleventh Sess. Territorial Assembly, 27. In 1877, after admission of the state, the same act was inserted in the Code as section 119, and a part of the statute now in force relating to attachments. Thus it appears that, under the former act of the territory governing attachments, (Rev. St. 1868, p. 52,) it was thought necessary to pass a special act giving the writ in actions to recover the value of ore taken from a mine; and after five years' experience of the act so passed, it was retained in the laws of the state in connection with the present act. In 1879 the legislature of the state repealed it unconditionally, (Second Sess. 230,) thus withdrawing the process of attachment from cases of this kind after it had been in use upwards of seven years. By this course of proceeding, the intention of the legislative assembly respecting the process of attachment in actions for trespass to mines was sufficiently expressed, and there is now no room for doubt in the matter.

It is true that the act embraced all injuries to mines, and was, therefore, more comprehensive than the present action. But this case is certainly within the terms. It is, in substance, an action of trespass, and will remain such, although called by another name. In practice the act of 1872 was resorted to, mainly, if not entirely, in actions to recover the value of ore taken from mines. Sometimes it became an instrument of oppression in the hands of adverse claimants, and an inconvenient method of trying title to mines. The legislature may have recognized the fact in repealing it; but, however that may be, it is enough to know that the act has been repealed. We are not required to examine other clauses of the act now in force to find out whether that which was repealed is lurking elsewhere; but we must assume that the legislature intended to discontinue the pro-

cess of attachment in all actions originating in trespass to mines. This action is of that character, and therefore the motion to quash will be sustained.

In another case, entitled the *Iron Silver Min. Co. v. Joseph Doyle*, the same question is presented, and the same order will be made.

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CHUNG YUNE v. KELLY.

(Circuit Court, D. Oregon. December 29, 1882.)

1. CUSTOMS DUTIES—ACTION TO RECOVER BACK.

The plaintiff brought an action to recover the amount of duties paid by him on merchandise entered as sago flour, but classed and taxed by the collector as starch, against the protest of the plaintiff that the article was sago flour and free of duty. *Held*, that the plaintiff must recover, if at all, upon the ground stated in his protest, and therefore he could not recover, although it appeared on the trial that the article was in fact, not flour, and not dutiable.

2. FLOUR—STARCH.

A flour which is made from a farinaceous plant for food, though largely composed of starch granules, is not, therefore, the "made" or manufactured starch of commerce, upon which the statute (section 2504, Rev. St. p. 481) imposes a duty when brought from a foreign country; and it matters not that it may be in some measure used as starch.

3. EXPRESS DESIGNATION OF AN ARTICLE.

The farina of the root of the plant of the genus *manihot*, whether known as root flour, cassava, or tapioca, having been expressly exempted from duty by congress, (section 2505, Rev. St. pp. 488, 489,) is not included in the statute, *supra*, imposing a duty on starches, although it may be largely composed of starch granules and fit for use as starch.

Action to Recover Duties.

Addison C. Gibbs and W. Scott Bebee, for plaintiff.

Rufus Mallory and James F. Watson, for defendant.

DEADY, D. J. This action is brought to recover from the defendant the sum of \$423.96, alleged to have been unlawfully collected by him from the plaintiff as duties on certain merchandise entered at this port by the latter. It is alleged in the complaint that on September 20, 1879, the plaintiff entered at the custom-house in Portland 148 boxes of merchandise, weighing 11,684 pounds, of the value of \$367.20, as sago flour, an article exempt from duty under the laws of the United States, upon which the defendant, as collector of said port, imposed and collected a duty of \$423.96, which the plaintiff was thereby compelled to pay, and that the plaintiff duly appealed from the decision of the defendant to the secretary of the treasury,

who affirmed the same, whereupon the plaintiff brings this action, etc. The defendant, by his answer, admits the allegations of the complaint, but denies "that said merchandise was or is sago flour," or exempt from duty; and, as a further defense, alleges that said merchandise was not "in fact sago flour," but "was starch not made from corn or potatoes, but some material to the defendant unknown, and as such starch was and is subject" to the duty collected thereon by the defendant. The case was tried with a jury, and there was a verdict and judgment for the defendant. The plaintiff moved for a new trial on the ground that the verdict was contrary to the law and the evidence.

A number of similar cases were pending against the defendant, and one—*Tond Duck Chung v. Kelly*—had been tried by the court, with a finding for the plaintiff on April 23, 1879, and afterwards retried with a jury, with a verdict for the plaintiff on January 13, 1880. The court not deeming the evidence produced on the trial by either party, as to the identity of the article in question, as satisfactory as it should be, for want of some known or admitted sample of sago flour with which to make a microscopic comparison of the granules of the former, postponed the consideration of the motion for a new trial until the trial of one of the other pending cases, before which it was expected that the parties would procure some samples of sago from Singapore, the place where the plaintiff claims that his flour came from, as a standard of comparison. Since then the case of *Chung Yune v. Kelly*, has been tried with a jury, and a verdict found for the defendant on December 8, 1882.

On the trial of this latter case it satisfactorily appeared, from the testimony of a witness sent to Singapore by the treasury department during the past summer, that sago flour is made in Singapore from the pith of the sago palm, (*sagus Rumphii*), grown there on plantations for that purpose; and that a root flour is made there from the root of a species of the genus *manihot*, also grown there on plantations for that purpose. The flour made from this root is called by the Chinese, who are principally employed in the plantations and factories, *ling fune*, root, or wood flour. It is also known in the books and in commerce as *cassava* meal, from which is made the tapioca of commerce, sometimes called Brazilian arrow-root, from the fact that it is probably indigenous to Brazil, from whence it has been introduced into other parts of tropical America, Florida, Africa, and the East Indies. Amer. Cyclo. "Cassava;" Nat. Dis. Stille & Maisch, "Tapioca." Its early use and origin is suggested by a provision con-

tained in an agreement made early in the sixteenth century between Andres Nino and the king of Spain, by which that royal adventurer agreed to aid the latter in an expedition to the South sea—the Pacific ocean west of Panama—for “gold, silver, pearls, and precious stones,” by furnishing for its use, at Jamaica, among other things, “2,000 loads of *cassava* root and 500 hogs.” 1 Ban. His. P. S. 480, No. 2. But whether the cassava was intended as food for the “people” of the expedition or the “hogs” does not distinctly appear—probably for both. Samples of the flour or meal of the palm and the cassava, thus obtained from the plantations on the island of Singapore, were produced in court on the trial, and the article in question was subjected to a microscopic examination and comparison with these, and the evidence of the experts was unqualifiedly to the effect that, judging from the size and shape of the starch granules, the article imported by the plaintiff is not sago flour, and is cassava or root flour. And upon a personal examination of the granules of the three articles with the aid of the microscope, the difference in size and shape and the location of the *hilum* between those of the Singapore sago and the article in question was very marked, while the resemblance in those particulars between the granules of the latter and the cassava was equally manifest.

In the present case, as well as that of *Chung Yune v. Kelly*, the issue to be tried arose upon the allegation of the plaintiff that the article imported was sago flour, and the denial of the same by the defendant.

The goods were entered by the plaintiff as sago flour, and he protested against the payment of duties upon that ground alone. His right to maintain this action at all depends upon the statute, (section 3011, Rev. St.,) and he cannot recover under it unless he protested in writing against the payment of the duties, stating therein, “distinctly and specifically,” the grounds of such protest. *Nichols v. U. S.* 7 Wall. 126; *Mason v. Kane*, Taney, 176; *Thomson v. Maxwell*, 2 Blatchf. 385; *Warren v. Peaslee*, 2 Curt. 235.

The burden of proof is upon the plaintiff, and before he can recover he must prove the truth of his allegation and protest that this article is sago flour. And therefore it is that it is of no avail to the plaintiff in this action that it now appears that this article is not dutiable, and ought not to have been charged with duty, because root flour, tapioca, and cassava are all on the free list as well as sago. Rev. St. 488, 489.

An issue was also made in the pleadings as to whether this article is "starch" made from some material other than potatoes, corn, or rice, and, as such, liable to pay a duty of three cents per pound and 20 per centum *ad valorem*, under schedule M, page 481, of the Revised Statutes. This issue was tendered by the defendant, and in the trial of it the burden of proof is upon him. It is probably an immaterial issue, as it is not apparent how any finding upon it could control or affect the final judgment in the case. But evidence and argument was given and made to the jury upon it at the trial without objection; and in the case of *Chung Yune v. Kelly*, it being manifest that there must be a verdict for the defendant upon the ground that the merchandise was not sago flour, the court, to enable the parties to have the benefit of the trial on this point, if the same should in any way become material hereafter, instructed the jury, if they found a verdict for the defendant, to find the answer to the following question, then submitted to them in writing, (Or Code Civil Proc. § 212),—"Is the article in question, and imported and entered by the defendant, a starch known to commerce as such, and made and intended to be used primarily by laundrymen in the stiffening and polishing of clothes"—to which the jury answered "No."

This answer is undoubtedly according to the law and the fact. This "ling fune" or "root flour," like the flour of wheat, corn, rye, rice, and other starch-bearing plants, is largely composed of starch granules, and may be used as starch. But it is not "made" or manufactured starch, or known to commerce as such.

It appears to be imported to this coast from Hong Kong, by the Chinese, as an article of food, though some small proportion of the quantity imported is used as starch in the laundries, to give a degree of luster and stiffness to the clothes which is said not to be attainable by the use of the ordinary starches.

The preparation of starch granules "made" or manufactured from the flour of farinaceous plants, for the purpose of being used in the arts as starch, sizing, or stiffening, and not food, is the starch of commerce, and the article upon which the clause in the statute imposing a duty on starch applies. It would be just as far-fetched and unreasonable to construe the statute as authorizing a duty on wheat flour because of its starchy nature, as on root or sago flour. Both are for the greater part composed of starch granules, and may be used for starch.

But it matters not what are the component parts of the root flour, or for what purpose it is used. Congress, by the act of June 6, 1872,

(17 St. 234,) has placed it, since August 1, 1872, on the free list, and exempted it from duty by name. And this is sufficient to exclude it from the operation of the general clause imposing a duty on starches. When an article is designated in an act of congress by a specific name, general terms in the same or a subsequent act, although broad enough to comprehend it, are not considered applicable to it. A designation of an article *eo nomine* must prevail over a general description. *Homer v. The Collector*, 1 Wall. 486; *Reiche v. Smythe*, 13 Wall. 162; *Movius v. Arthur*, 95 U. S. 144; *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Rheims*, Id. 143.

The evidence introduced on the trial of this case was conflicting and unsatisfactory, because of the want of a known standard with which to compare the article. The weight of it may have been with the plaintiff, but that is not enough to justify a verdict for him. Leaving out of consideration the evidence of the defendant, the evidence of the plaintiff as to the identity of the article was open to question and doubt; and while the court might not feel authorized to set aside a verdict obtained upon it, for a stronger reason it would feel less so in case the verdict was against it.

But in the light of the evidence and verdict in the case of *Chung Yune v. Kelly*, it would be useless to grant a new trial in this case, as it would be followed, so far as can be seen, by another verdict for the defendant.

The motion is denied.

## FORTY SACKS OF WOOL.

(Circuit Court, D. Massachusetts. December 20, 1882.)

### 1. CUSTOMS—REVENUE LAWS—INTENT TO DEFRAUD.

Where wool was sought to be subjected to forfeiture for intent to defraud the customs revenue laws, an amended information that the wool was obtained otherwise than by purchase, namely, by importation, is insufficient, as importation is not a mode of acquiring property.

### 2. PURCHASE OF GOODS—TITLE, WHEN PASSES.

Where goods are purchased at a certain place and are sent by bill of lading indorsed to a third person as security for a draft, the property does not pass until the draft has been accepted or paid, or there has been a waiver of acceptance or payment.

### 3. SAME.

If a buyer in a doubtful case should state his purchase as having been made at either of two places, he is not to forfeit his property unless there is direct evidence that he made a willful misstatement with an actual intent to defraud.

This information charged that J. H. Mooney, the owner and claimant of the wool proceeded against, had imported it from Montreal into the United States by means of a false and fraudulent invoice, which declared the market value of the goods at Montreal to be 32 cents a pound, when it was much more.

The invoice, when produced, was found to contain no statement of market value; but it set out a purchase of the goods at Montreal, for 32 cents a pound, which required no averment of market value. Thereupon, by consent, an amendment was filed, of which the substantial allegations were:

"That it was therein falsely set forth and stated that the said 40 sacks of wool were purchased by said Mooney at said Montreal in the said month of February for 32 cents, including all charges, whereas, in truth and in fact, they were not purchased in Montreal, nor in said month of February, nor at the price and cost of 32 cents a pound, including all charges, but the said statement was wholly false, as the said Mooney at the time of making said entry well knew.

"And the plaintiffs say that the said wool was procured by the said Mooney at said Montreal, on said fifth day of February, otherwise than by purchase; that is to say, the said Mooney had imported the same from Liverpool, England, into said Canada, and had, prior to the importation thereof into the United States, at St. Albans, as aforesaid, repacked the said wool in new and different packages from those in which it had been imported from said Liverpool as aforesaid, \* \* \* which invoice was false, in that it did not set forth the manner in which said wool had been procured and repacked as aforesaid, and that it did not set forth the actual market value of said wool at Montreal."

It appeared in evidence that Mooney obtained a letter of credit from the Merchants' Bank of Canada, doing business at Montreal, which he sent to Ronald, Sons & Co., of Liverpool, wool merchants, who shipped this wool with other lots to Montreal, by way of Halifax, and took a bill of lading "to order," which they indorsed. They drew a draft on Mooney for the price of all the wool, payable to the order of the Merchants' Bank of Canada, and sent the bill of lading, invoice, and draft to the bank. The draft was presented to Mooney, who accepted and in due course paid it. The bill of lading was delivered to him, and he paid the freight and removed the wool into his warehouse. The wool did not cost Mooney above 32 cents a pound.

The United States asked the judge to rule that the purchase was made by Mooney in Liverpool and not in Montreal, which he refused to do; he likewise rejected evidence of the market price of wool at Montreal, which was offered by both sides; and upon the whole case he ordered a verdict for the claimant. The United States excepted to all these rulings and brought this writ of error.



*G. P. Sanger*, Dist. Atty., for plaintiff in error.

*C. L. Woodbury* and *J. P. Tucker*, for defendants in error.

LOWELL, C. J. If this wool was worth more than 32 cents a pound at Montreal, the collector at St. Albans, upon report of the appraisers to that effect, would have been bound to collect a larger duty than if its value was 32 cents or less; but the importer was under no obligation to state in his invoice what he may have supposed the market value to be, unless he obtained the goods "otherwise than by purchase."

The theory of the amended information is that this wool was obtained otherwise than by purchase, namely, by importation from Liverpool; but, as importation is not a mode of acquiring property, this ground was abandoned in argument, and the point now taken is that the purchase was made at Liverpool, and not at Montreal; or that, at least, this question should have been submitted to the jury. It is admitted that every fact is truly stated in the invoice unless it be the place of purchase. The goods were bought, and they cost at Montreal less than 32 cents; but the government insists that they were bought at Liverpool. If this be so, the information, as I have already said, does not charge this as the false statement, and the government cannot prevail.

Even if the information was sufficient, still the fact is that these goods were bought at Montreal. The cases cited by both parties show that where goods are sent, as these were sent, by a bill of lading indorsed to a third person as security for a draft, the property does not pass, at law, until the draft has been accepted or paid, or there has been a waiver of acceptance or payment. Until one of these things is done, the goods cannot be attached as the property of the buyer; and if he should obtain possession of them, he cannot give a good title even to a *bona fide* purchaser. *Dows v. Nat. Exch. Bank*, 91 U. S. 618; *Jenkins v. Brown*, 14 Q. B. 496; *Newcomb v. Boston & L. R. Co.* 115 Mass. 230, and two cases immediately preceding and two following that case in the report; *Shepherd v. Harrison*, L. R. 4 Q. B. 197, 493; L. R. 5 H. L. 116; *Benj. Sales*, (2d Am. Ed.) § 399, and cases.

No doubt the buyer has an equitable title. If the bankers, for example, had sold the goods and indorsed the bill of lading to a stranger, Mooney might have recovered of them whatever the goods were worth above the original cost. But the legal title came to him in Montreal. Still further, the revenue laws, though liberally construed for the government, must be construed reasonably, and as an

importer may be supposed to understand them. If the buyer, in a doubtful case, should state the purchase either way, as having been made in Liverpool or in Montreal, he is not to lose his property, unless there is some *scintilla* of evidence that he made a willful misstatement with intent to defraud.

In this case there was no evidence tending in the slightest degree to prove fraud in any direct way. The United States endeavor to prove an actual intention to defraud them, without which no forfeiture can be imposed, (St. 1874, c. 391, § 16; 18 St. 189,) argumentatively, as thus: Liverpool was the true place of purchase; when, therefore, the claimant gave Montreal as the place, he must have had a motive; that motive must have been to deceive the appraisers by stating a particular purchase which they would take as evidence of market value. If this roundabout way of proving actual fraud, without any other single fact or circumstance corroborating that view of the transaction, were sufficient to establish a *prima facie* case, it would, of course, be competent to prove that the market price did not exceed 32 cents at Montreal. But the judge ruled out evidence of this, and ordered a verdict, very properly, because the fact as stated was true, and even if not, there was no reason to suppose that anything but a most natural mistake had been committed. Judgment affirmed.

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**NEW ORLEANS NAT. BANKING ASS'N and others v. LE BRETON, Assignee,  
and others.\***

(Circuit Court, E. D. Louisiana. December, 1882.)

**1. ASSIGNEE—REVOCATORY ACTION.**

No action, pure and simple, for the annulment of a fraudulent conveyance—no revocatory action—can be brought or be maintained by a creditor or creditors of a bankrupt, but such action must in all cases be brought and be maintained by the assignee.

*Glenny v. Langdon*, 98 U. S. 20.

**2. SAME—FORECLOSURE OF MORTGAGE.**

But a bill to foreclose a mortgage, notwithstanding a fraudulent transfer of the mortgaged property, and notwithstanding the bankruptcy of the mortgage debtor, may be brought and maintained by the mortgage creditor.

**In Bankruptcy. On demurrers to bill and cross-bill.**

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.  
See 7 Sup. Ct. Rep. 772.

*John D. Rouse and Wm. Grant*, for complainant.

*Andrew J. Murphy*, for Charles P. McCan.

*E. W. Huntington*, for Mechanics & Traders' Bank.

*James McConnell, Robert Mott, and Henry B. Kelly*, for defendants.

PARDEE, C. J. The case made by the bill and reiterated in the cross-bill shows that the complainants are the holders of certain mortgage paper given by one Williams and bearing on a certain sugar plantation in the parish of Terrebonne, in this state; that S. H. Kennedy & Co. were also holders of mortgage rights on the same plantation; that Kennedy & Co. combined with Williams to make a fraudulent transfer of the plantation, so as to defeat the other mortgage holders, in pursuance whereof a pretended judicial sale was made, S. H. Kennedy becoming the purchaser and transferee, and entering into possession; that subsequent thereto Williams took the benefit of the bankrupt act and received his discharge; that the indebtedness of Williams to complainants was admitted on the bankruptcy schedules; and that defendant E. D. Le Breton is the duly-appointed assignee in bankruptcy.

The relief sought is to have the alleged fraudulent transfer annulled as against complainants' demands, the plantation declared subject to their mortgage rights, for an account, and a foreclosure. The demurrers are on the ground that the complainants have no right to bring and maintain the suit; but the suit, if brought at all, must be brought by Williams' assignee in bankruptcy.

It seems to be clear, and it is conceded for this case, that all suits brought for the benefit of the bankrupt's estate must be in the name of the assignee, who represents that estate, and that a general creditor, an unsecured creditor, a creditor at large, in short any creditor who must look to the bankrupt's estate for his claim, or who derives any of his rights of action by or through the bankruptcy, cannot maintain an action to set aside a fraudulent conveyance of the bankrupt. And, for the purposes of this case, we may go further, and concede that no action, pure and simple, for the annulment of a fraudulent conveyance—no revocatory action—can be brought or be maintained by the creditor or creditors of a bankrupt; but such action must in all cases be brought and be maintained by the assignee in bankruptcy. See *Glenny v. Langdon*, 98 U. S. 20.

But such rule does not seem to affect the case under consideration. The complainants derive none of their alleged rights through the bankruptcy. Williams' solvency or insolvency would not defeat their action. The suit is not for the benefit of the bankrupt's estate; it is

not intended or calculated to bring a dollar to the hands of the assignee. It is not clear that if successful it will indirectly benefit the bankrupt's estate, even by relieving it of general liability. It is not clear that the assignee could maintain the suit, nor that if he could it would in anywise be to his interest to bring it. See *Dudley v. Eastern*, 104 U. S. 99. The complainants have an interest adverse to the assignee in so far as they claim mortgage rights; for, while it appears that the amount of their claims against the bankrupt are fully admitted on the schedules, it does not appear that their mortgage rights are admitted. If not admitted, a suit to enforce them would be adverse to the assignee's interest.

The view I take of this case is that it is a bill to foreclose a mortgage; a bill to foreclose notwithstanding a fraudulent transfer of the mortgaged property; a bill to foreclose notwithstanding the bankruptcy of the mortgaged debtor.

It seems clear to me that the demurrers should be overruled, and the defendants required to answer. And such judgment will be entered.

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### MORGAN ELEVATED RY. CO. v. PULLMAN.

(*Circuit Court, N. D. Illinois.* December 4, 1882.)

#### PATENTS FOR INVENTIONS—ELEVATED RAILWAYS.

A patent for a plan and design for the construction of an elevated street railway, to be composed of a series of arches, supported on each side of the street upon iron shoes imbedded in masonry, and connected together by arched trusses and tension-rods, to impart sufficient strength and rigidity to prevent any vertical or lateral displacement of the railway,—the essential element of the invention being the arcs or arches, supported and strengthened in the manner stated, — *held*, not infringed by any elevated railway, constructed without these essential features.

*Hamilton Spencer, Henry A. Gardner, and A. T. Ewing*, for complainant.

*Judge Green, Robert Williams, and Wirt Dexter*, for defendant.

DRUMMOND, C. J. On the twentieth of April, 1869, letters patent were granted to Richard P. Morgan, Jr., for an improved elevated railway. The bill alleges that the defendant, without the consent of the plaintiff, and since the letters patent were issued to Morgan, has constructed, in the city of New York, an elevated railway upon the plan and design secured to Morgan by the said letters patent, and

in violation of the rights of the plaintiff. The bill also alleges that the plaintiff has become, by proper deeds of assignment, the owner of all the rights of Morgan under the patent.

The defendant, in his answer, admits that he is a stockholder and director of the Metropolitan Elevated Railway Company of the city of New York; but he denies, among other things, that the Metropolitan Railway Company was built upon the plan or design alleged to have been secured by the letters patent to Morgan.

Waiving all questions connected with the validity of the letters patent granted to Morgan, I propose to consider only this question, viz., whether the Metropolitan Elevated Railway in New York is an infringement of that described by Morgan in his letters patent, because if that question is decided against the plaintiff then we need not consider or decide other questions which have been made in the case. It becomes necessary, therefore, in this view of the case, to ascertain the nature and character of the elevated railway described by Morgan in his letters patent, as well as the nature and character of the construction of the Metropolitan Railway of New York. As preliminary to this, however, certain facts and principles should be stated which do not seem to admit of any serious controversy: (1) Morgan was not the first inventor of an elevated railway for the rapid transit of passengers in large cities. The proof shows that other persons preceded him in this field of discovery. (2) Morgan could not be the inventor and so entitled to a patent of an elevated railway in large cities as such, but only to the particular means or instrumentalities by which a railway was constructed.

Morgan, in his specifications, declares that his invention consists "in the construction of a street railway, composed of a series of arches, supported on each side of the street upon iron shoes imbedded in masonry. These arches are connected together by trusses of an ordinary or suitable construction, which will impart sufficient strength and rigidity to the whole superstructure to prevent any vertical or lateral displacement of the railway." He then proceeds to give a description in detail, accompanied by drawings, of the particular manner in which his elevated railway is constructed. Posts are imbedded in masonry on each side of the street. These, rising from the place where they are imbedded, form an arch immediately over the center of the street. There is an interior arc or arch attached to the posts already named, extending across the street in an elliptical, semi-circular, or other curve below the principal arch. These two arcs are connected together by trusses and tension and stay-rods, in the man-

ner particularly described in the specifications and in the drawings, an indispensable part of which would seem to be a tension rod of great strength extending from the apex of the upper arch to the lower arch. In the opening between these two arches, left by the trusses and the tension rods, as described in the specifications, is a sufficient space for the cars to run without obstruction. The material of which these posts, arched trusses, and tension rods are constructed is assumed to be iron, wrought iron, or angle-iron. A series of arches being thus constructed at suitable distances from each other, and connected together by longitudinal stringers of sufficient solidity and strength, with proper trusses, constitute the elevated railway described by Morgan in his letters patent. He makes five claims, as follows:

"(1) The elevated railway constructed and arranged in the manner and for the purpose herein described. (2) The arches, *a* and *b*, so constructed as to act as a support to each other in sustaining the superstructure and trains in a street railway in the manner and for the purpose herein described. (3) The combination of the arcs or arches, *a* and *b*, with the truss frames, *c* and *d*, in the manner and for the purpose herein described. (4) The connection of the arcs or arches, *a* and *b*, of an elevated street railway by means of truss frames, in the manner and for the purpose herein described. (5) The combination of the arcs or arches, *a* and *b*, with the tension rods herein described, so as to resist the vertical and lateral pressure upon the whole superstructure, and by a conflict and consequent resolution of forces, to direct the same in the line of the greatest strength of the material employed, thus enabling a light and economical structure to be used, and interfering in the smallest possible degree with the space, light, and ventilation of the streets occupied and the buildings thereon."

There can be no doubt that in the specifications and drawings, an essential element of the invention described by Morgan, and which is comprehended in all of the five claims made by him, is the arcs or arches supported and strengthened in the manner stated by him; and that any elevated railway, constructed without these essential features contained in the elevated railway of Morgan, does not infringe the patent. We have the testimony of several witnesses who describe the manner in which the Metropolitan Elevated Railway is constructed, and we have also in evidence several photographs which give a distinct view from different points of the railway itself, so that we are enabled to form a very clear idea of the manner in which it has been constructed. There are posts or shafts fastened in the ground, near the curbstone, rising to a proper elevation, across which are placed wrought-iron beams, which extend from one side of the street to the other, strengthened by a short circular flange at the end

of each beam, and attached to the post. These beams are formed by the union of wrought-iron plates stayed by angle-irons and by means of rivets, and have the appearance of being solid. They are three or four feet deep vertically. A series of these are constructed and are connected together by stringers of proper strength, and with trusses, and upon these the rails are laid upon which the cars run; there being, in fact, nothing above the rails. There really seems to be no similarity in the construction of these shafts and beams, as thus described, to the arches of the plaintiff's patent; unless, possibly, in the fact that there springs from the top of each post, or shaft, a sort of flange in a circular form, not essentially different from an ordinary bracket, which is attached at a short distance from the shaft to the beam. Indeed, these beams would be described as girders, and not at all as arches; and from a mere inspection of the construction of the two elevated railways, that of the Morgan and the Metropolitan Elevated Railway of New York, the contrast is apparent.

It is not necessary to consider what might be the effect of the construction of such an elevated railway as that described by Morgan in the streets of New York, with the short curves at right angles there made; it is sufficient to say that the difference between the two railways, though both are of iron, is so clear and distinct that they cannot be said to be a pattern or an imitation one of the other.

There does not seem to be anything particularly novel in the construction of either railway, in connecting longitudinally the various parts together. They are not, in either case, essentially different from the manner in which bridge stringers had been stretched before, from pier to pier. In comparing two structures of this kind, we have to be guided very much, even after examining the details of both, by the manner in which they strike the eye; and thus judging of them I am clear, independent of what has already been said upon other grounds, that the structure called the Metropolitan Elevated Railway of New York is not an infringement of the elevated railway covered by the patent of Morgan, and so the bill will be dismissed.

## FAY v. PREBLE, Adm'x.

*(Circuit Court, N. D. Illinois. December 4, 1882.)*

## PATENT FOR INVENTION—EXPANDED CLAIMS IN REISSUE.

Where the true and only allowable construction of complainant's patent for an improvement in planing machines requires that the pressure rollers shall be used in combination with independent swinging arms, as described in the specifications, he cannot by a reissue be permitted to expand the claims so as to cover all divided or broken pressure rollers; and where defendant does not use the swinging arms, nor complainant's combination of those arms, with his pressure rollers, there is no infringement.

*Parkinson & Parkinson*, for complainant.

*Geo. P. Barton*, for defendant.

BLODGETT, D. J. This is a bill for an injunction and account by reason of the alleged infringement of a patent issued by the United States to James Goodrich and Henry J. Colburn, bearing date February 7, 1871, and numbered 111,632; and reissued on the first of October, 1878, to the said Goodrich and Colburn, assignors of W. H. Doane, the reissue being No. 8,438, for "an improvement in planing machines." The defense relied on is (1) that the reissued patent is void, for the reason that it is for a different invention than that covered by the original patent; and (2) that the defendant does not infringe.

The feature of the original patent brought in question by this suit is a device by which the lumber to be planed is held or pressed down to the traveling bed of the planing machine by means of two or more pressure rollers placed in a line across the bed of the machine so that their united length shall reach across the bed. The original device, as patented by Goodrich and Colburn, contained several features which the inventors seemed to think of much more merit than the special feature in question in this suit, and those elements or features formed the subject of the first three claims of the patent.

There is no proof in the record that a practical working machine embodying all the distinctive features of the original patent was ever made and operated for planing lumber, and the opinions of several witnesses of much experience in the working of this class of machinery are given in proof to the effect that a useful planing machine could not be made by following the specifications and drawings shown in the patent. It also appears from the proof that in the year of 1877 the complainant company and another manufacturer of plan-



ing machines made and put upon the market machines containing, among other features, divided or broken pressure rollers. These machines proved useful and acceptable to the trade, and in August, 1878, undoubtedly for the purpose of securing to this complainant the exclusive right or monopoly in the market for this class of machines, Mr. Doane, president of the complainant company, secured from Goodrich and Colburn an assignment of their original patent, and obtained the reissue now before the court.

The original patent contained four claims, the first three of which relate to features not involved in this suit, and the fourth claim was intended to cover so much of the device as related to the divided or broken pressure rollers. The reissued patent contains eight claims, the first four being substantially the four claims of the original patent; and the fifth, sixth, seventh, and eighth all relate to the divided pressure rollers, and are intended to claim and cover more fully and particularly this characteristic of the machine. The fourth claim of the original and reissued patent, in substance, is for "the combination of the springs, E4, E4, with the yokes, E3, E3, the frames, E2, E2, E1, E1, and the rollers, E, E, as herein described, and for the purposes set forth." The new claims in the reissue state more minutely the operation of the machine and the combination of these parts with the traveling bed and other parts of the machine. If these new claims are intended to be and are an expansion of the claims of the original patent so as to enable the present owners of the patent to claim elements which the original patentees did not see fit to claim, then they are undoubtedly void under the rule established by the supreme court in *Miller v. Brass Co.* 104, U. S. 350, and *Campbell v. James*, 104 U. S. 356; while if these new claims are only restatements of the functions and mode of operation of the elements of the fourth claim in combination with the other parts of the machine, then they are but another mode of formulating the old fourth claim. The original fourth claim was for the rollers, frames, yokes, and springs, as shown and described in the specification, acting, of course, through and with the other parts of the mechanism to make an operative machine; and, in my estimation, a claim of a combination of those elements of the old fourth claim with the other parts of the machine does not add anything to that old fourth claim, because the operation of those elements with the other parts of the machine, like the traveling bed or cutter-heads, was implied or understood in the original fourth claim. I shall, therefore, confine myself

to the question whether the machine made by the defendant infringes the fourth claim of the reissued patent.

In the specification of the reissue this feature of the patent is described as follows:

"The pressure rollers, E, E, figures 2, 3, and 4, are connected to independent swinging arms, E1, E1, E2, E2, so that they are free to follow the surface of the article to be planed; the journals of the rollers having boxes so arranged that this action can take place. E3, E3, figure 4, are yokes, the ends of which rest upon the arms, E1, E1, E2, E2. Upon the middle of these, yokes E4, E4, pressed, so that the arms E1, E1, E2, E2, are pressed constantly downward against the work."

It will be seen from this description that the independent swinging arms which carry upon their forward ends the pressure rollers are a distinctive feature or element of the complainant's device. The function and mode of operation of these swinging arms is such that either end of the roller may rise without raising the opposite end, thus giving to these rollers an adjustable element which enables them to adapt themselves to the surface of the lumber on which they are to operate.

The defendant's machine contains a divided roller, or two rollers, the united length of which reaches across the bed of the machine; but these rollers are fixed on rigid frames which have only a vertical motion, and the rollers cannot be tilted or one end raised, while the other remains stationary or is not raised so much. There is nothing in defendant's machine which corresponds to these swinging arms in complainant's machine, or which can be deemed the equivalent of these arms. The characteristic which these arms impart to complainant's device is not found in defendant's machine. The defendant's rollers must rise vertically in a line parallel to the bed of the machine.

If complainant, by the new claims in the reissue, intends to cover all divided rollers or machines where transverse pressure rollers are used in sections or parts, then the proof shows that more is claimed than can be allowed by the state of the art when these patentees entered the field, because the English patent to Gracie clearly shows several pressure rollers acting independently across the bed of a planing machine; and the same feature is also shown in several other English patents which are in proof, although, not so nearly identical in mode of operation and effect as those shown in the Gracie patent.

I am, therefore, of opinion that the true and only allowable construction of complainant's patent requires that the pressure rollers shall be used in combination with the independent swinging arms which are described in the specifications, and that complainant cannot by the reissue, be permitted to expand the claims of the patent so as to cover all divided or broken pressure rollers; and inasmuch as defendant does not use the swinging arms nor the complainant's combination of those arms with his pressure rollers, there is no infringement. The bill is dismissed for want of equity.

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WISNER and others v. Dodds.\*

(Circuit Court, S. D. Ohio, W. D. January 3, 1883.)

PATENTS—PRACTICE ON REFERENCE—PRODUCTION OF BOOKS ON CROSS-EXAMINATION.

Upon a reference of a patent cause to a master to take an account of damages, etc., one of the complainants testified as to the cost of manufacturing and selling the patented article in controversy, the number manufactured and sold by his firm, etc. *Held*, that defendant, upon cross-examination, is entitled to the production of the books of witness' firm, but complainants may, if they so elect, withdraw the witness and his testimony as far as given.

In Equity.

*Stem & Peck*, for complainants.

*Parkinson & Parkinson*, for defendants.

BAXTER, C. J. In this case—which was a suit in equity to enjoin an infringement of the patent therein mentioned, and for an account of damages, etc., for alleged part infringement thereof—a decree was rendered in complainants' favor, and a master ordered to take and state the account. John W. Stoddard, one of the complainants, appeared before the master and was examined in his own behalf. After stating that he had been engaged for a long time in manufacturing hay-rakes in accordance with the patent alleged to have been infringed, etc., he proceeded to state what it costs to manufacture and put them on the market, the number manufactured and sold by his firm during and after defendants' infringement, and the prices obtained for them. This evidence, it is said, tends to show the extent of defendants' gains and profits, and furnish a basis for esti-

\*Reported by J. C. Harper, Esq. of the Cincinnati bar.

mating the amount of damages, etc., sustained by the complainants. The defendants then, by way of cross-examination, asked the witness if the firm kept books during the period mentioned, and, if so, if they would sustain his testimony in relation to the cost and quantity of material entering into each rake, the price paid therefor, the cost of making and selling the same, the quantity so made and sold, and the profits realized therefrom, and, if they would, defendant demanded their production before the master. Complainants, through their counsel, objected to the production of said books; and thereupon all further action was adjourned until the question raised could be certified to and instructions received from the court in relation thereto.

We need not now decide how far the witness' testimony in chief is material to the issues to be decided. But it is manifest that complainants regard it as important and valuable. If it is, then defendant is entitled to test its accuracy. He is not *concluded* by what the witness has said. If the witness says that the books kept by his firm, recording their daily business transactions, are correct, the defendant, it seems to me, is entitled to their production to verify the truth of the witness' evidence, if he tells the truth, or to contradict him, if he testifies falsely. Complainants may, if they shall elect to do so, withdraw the witness and the testimony thus far given by him. But if they insist on retaining his testimony, and defendant insists on a production of complainant's books, the same will have to be exhibited. This, however, may be as conveniently done in complainant's business office as elsewhere. If complainants will make the exhibit required in their office, they will not be required to produce them at any other place, unless some exigency shall hereafter arise requiring their production at some other and different place.

See *Wisner v. Dodd*, 2 FED. REP. 781, for opinion of Justice SWAYNE sustaining the patent.—[REP.]

## FAULL v. ALASKA GOLD &amp; SILVER MINING CO.

(Circuit Court, D. Oregon. January 4, 1883.)

## DEBT DUE BY STOCKHOLDER TO CORPORATION.

Judgment was obtained by the plaintiff against the defendant for \$19,002.05, and an execution thereon as against the defendant returned *nulla bona*, and served on F. B. Harrington, as a debtor of the defendant, for \$168.50, on account of unpaid calls or assessments made upon said Harrington's shares in the capital stock of the defendant, to which Harrington answered he owed the defendant nothing; but the answer not proving satisfactory to the plaintiff, he procured an order under section 309 of the Code requiring the former to appear before a referee for examination; whereupon the plaintiff served written allegations concerning said indebtedness, as provided in section 162 of the Code, to which the garnishee demurred that the court had no jurisdiction, and that the garnishee is not liable in this proceeding. *Held*, (1) that the proceeding by garnishment under sections 150 and 161-9 of the Code does not authorize a demurrer to the allegations of the plaintiff, but requires an answer thereto by the garnishee, to which exceptions may be taken for insufficiency; (2) a due and unpaid call or assessment upon the shares of a stockholder in the capital stock of a corporation is a "debt" due such corporation, within the purview of section 147 of the Code, and may be collected from such stockholder by a judgment creditor of the corporation by garnishment, under sections 150 and 161-9, aforesaid.

At Law. Action to recover money.

*Rufus Mallory and James F. Watson*, for plaintiff.

*James Gleason*, for garnishee.

DEADY, D. J. On August 11, 1882, the plaintiff, a citizen of the state of California, obtained a judgment in this court against the defendant, a corporation organized under the laws of Oregon, for \$19,002.05, upon which, on November 20th, an execution was issued and returned, as to the defendant, "no property found," and duly served upon F. B. Harrington as a debtor of said defendant, in the sum of \$168.50, who thereupon answered that he did not owe the defendant anything.

The answer of Harrington not being satisfactory to the plaintiff, he obtained an order from this court, under section 309 of the Code of Civil Procedure, requiring the former to appear before a referee and be examined on oath concerning said indebtedness.

Thereupon, on December 15th, the plaintiff served upon said garnishee written allegations concerning the same, as provided in section 132 of said Code, to which the garnishee, before the referee, demurred (1) that the court had no jurisdiction of the garnishee or the subject; (2) that the facts stated do not show a cause of action

or garnishment against the garnishee; (3) that there is a defect of parties plaintiff and defendant; and (4) that the plaintiff has not the legal capacity to sue; whereupon the proceeding was adjourned into court, and the questions made by the demurrer argued by counsel as upon a demurrer to a complaint.

This proceeding is taken and conducted under sections 150 and 161-9 of the Code of Civil Procedure.

By these, the garnishee is required to answer the allegations under oath, or judgment may be given against him for want of an answer, as in an action. The plaintiff may except to such answer for insufficiency, or reply to it, and the issues arising between the parties shall be tried as ordinary issues of fact. No provision is made for a demurrer to the allegation by the garnishee; and it would seem that the only mode by which he can raise the question of the jurisdiction of the court or the legality of the proceeding is to allege such want of jurisdiction or illegality in his answer, and decline to answer further on that ground. An exception to such an answer for insufficiency by the plaintiff would present the question of jurisdiction or legality as upon a demurrer to the allegations. The pleading of the garnishee in this case is denominated a demurrer, but it may be treated as an answer denying the jurisdiction of the court, and the liability of the garnishee to the defendant upon the facts stated in the allegations, to which exceptions may be filed as of the time of the argument.

In addition to the facts above stated, it also appears from the allegations of the plaintiff that the defendant has been a corporation, as aforesaid, since March 1, 1877, with its principal place of business at Portland, and having a capital stock of \$300,000, divided into as many shares, of the par value of one dollar each; that F. B. Harrington is a citizen of Oregon, and on January 1, 1879, and until June 1, 1880, was the owner of 1,500 of said shares, since which he has been and still is the owner of 1,300 of said shares; that between April 27 and August 9, 1880, the defendant, by its board of directors, duly levied and called for assessments upon all the unpaid stock of said corporation, amounting in the aggregate to 14 per centum thereof, or \$190 on the stock owned by said Harrington, and required the same to be paid at divers dates between May 15, 1880, and June 25, 1882, inclusive, of which sum only \$21.50 has been paid by Harrington, leaving still due the defendant thereon the sum of \$168.50.

The point relied on in the argument by the counsel for the garnishee is that the plaintiff's remedy is in equity, where all the creditors and stockholders may be made parties, and their rights and liabilities adjusted in one suit. In support of this position, counsel cites and relies on *Ladd v. Cartwright*, 7 Or. 329. That was an action at law by certain of the creditors of a corporation against an assignor of certain shares of its stock, who had owned such stock during the existence of their debt, for the unpaid balance of the same, without having attempted to collect their demand from the corporation, or the assignee and then holder of the stock. The court held that the action would not lie for the reasons: (1) No demand had been made of the defendant's assignee; (2) the remedy against the principal debtor, the corporation, had not been exhausted by judgment, and execution returned *nulla bona*; and (3) the plaintiff's remedy was in equity, when the rights of the corporation, the stockholders and the creditors, might be adjusted in one suit. But I do not think that case comprehends this. It certainly does not, in all its circumstances, and I think it does not in principle. The case was undoubtedly well decided upon the latter two points; but in this case the plaintiff has exhausted his remedy against the corporation, and the additional circumstance upon which the plaintiff relies—the assessment of the sum demanded of the garnishee by the corporation upon his stock—did not exist in that case, and the point here made on it was not considered by the court.

By the constitution of this state, article 11, § 3, it is declared that "the stockholders of all corporations \* \* \* shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." Corporations may be formed under general laws (Id. § 2) to engage in any lawful enterprise, business, pursuit, or occupation. Or. Laws, 524.

The liability of the individual stockholder for the indebtedness of the corporation being prescribed and limited by the constitution, the legislature may regulate the mode of enforcing it, and, in the absence of such legislation, resort must be had to the general and well-established modes of procedure applicable thereto. According to the weight of authority and the argument of convenience, there is no doubt that, after judgment and execution against the corporation, resort may be had to a suit in equity to ascertain the general indebtedness of the corporation, and to compel a ratable contribution from the individual stockholders for the purpose of paying the same. *Thompson, Liability of Stockholders*, §§ 265, 317; *Pollard v. Bailey*, 20 Wall. 524.

And it may also be admitted that unless it is otherwise provided by statute, that this is the only remedy against a stockholder for the debts of the corporation. Thompson, Liability of Stockholders, § 258. But the proceeding by garnishment in aid of an execution at law, furnishes an additional remedy in certain cases. And, in this connection, it ought not to be overlooked that such garnishment, so far as it goes, is given by the statute as a substitute for a creditor's bill. True, only the legal assets of a debtor may be reached by it, but as to these it may be regarded as a cheap and speedy substitute for the remedy by a creditor's bill, of which each judgment creditor may avail himself for himself, according to his diligence and opportunity.

Section 147, subd. 3, of the Oregon Code provides that property of the debtor in the possession of a third person, or a debt due him, may be attached "by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same, or if it be a *debt*, then with the debtor; \* \* \*" and by section 281 this section is made applicable to an execution.

It seems, then, that the determination of the case hinges upon the question whether this sum of \$168.50 was, at the time of the service of the execution upon the garnishee, a "debt" due from him to the defendant. If it was, it is a legal asset of the defendant, and may be reached by the plaintiff in this proceeding. It does not appear that the garnishee is an original subscriber to the capital stock of the defendant, nor what was the nature and terms of such subscription as to the time of payment. It may be said that the garnishee took his shares of the stock subject to the conditions as to payment contained in the subscription made by the person to whom said shares originally issued, and that, therefore, the court cannot say there is any sum due from him to the defendant thereon, until it appears by the terms of the subscription that the person to whom they were issued, or his assigns, thereby agreed to pay all calls or assessments upon said shares when and as they might be made by the directors of the corporation.

It is said in Ang. & A. Corp. § 517, that a subscription for shares in the stock of a corporation is a contract for a consideration, on which the corporation may maintain an action against the subscriber for the amount of such shares. But it must be implied in this statement that there is an express provision in the subscription to the effect that the subscriber will pay as required by the corporation, or that a subscription to the capital stock of a corporation, not containing any special terms as to payment, is equivalent to a promise to pay on demand.



The corporation law of this state contains no express provision declaring the effect, in this respect, of a subscription to the capital stock of a corporation; and doubtless the parties forming a corporation may insert any conditions they please on the subject in the articles of incorporation.

By subdivision 6 of section 5 of the corporation act (Or. Laws, 525) a corporation is authorized to make by-laws for the forced sale of its stock for unpaid assessments; and by section 14 of the same (Id. 527) it is provided that a sale of stock transfers to the purchaser all "the rights of the original holder or person from whom the same is purchased," and subjects "such purchaser to the payment of any unpaid balance due or to become due on such stock;" and if the sale is voluntary, "the seller is still liable to existing creditors for the amount of such balance, unless the same is duly paid by such purchaser." By a necessary implication, this section (14) asserts the personal liability of the subscriber for or holder of stock to pay the amount thereof according to the terms of the subscription; and if the subscription is silent on that point, then upon demand,—that is, at such times and in such amounts as the corporation may from time to time direct or require.

There being, then, a fixed and specific sum due from the garnishee to the defendant at the time of the service of the execution on the latter, the same was a debt or legal asset of the defendants, and liable to be levied on or attached by the plaintiff in satisfaction of his judgment against the defendant. It is a debt absolute and not contingent, as is the remaining portion of the subscription not yet called in or ordered paid. It is therefore as much a legal asset of the corporation, and as liable to be taken or attached on an execution against it, as a debt due it from the garnishee for money loaned or goods sold and delivered.

The only cases in which the exact question involved in this one appears to have been considered are *Cucullu v. Union Ins. Co.* 2 Rob. (La.) 571, and *Brown v. Same*, 3 La. Ann. 177, 188, cited in Thompson, *Liability of Stockholders*, § 276. Between the two cases it was held that for any portion of an unpaid subscription for which the directors had made a formal call, a judgment creditor of the corporation might proceed against the delinquent stockholder by garnishment.

# MERCHANTS' NAT. BANK v. SEVIER and another.

(Circuit Court, E. D. Arkansas. October Term, 1882.)

## 1. PROMISSORY NOTE—VOID PROVISION IN.

A provision in a promissory note "to pay an attorney's fee of 10 per cent. on the amount due if suit is brought to enforce payment, for use of the attorney bringing the suit," is a stipulation for a penalty or forfeiture, and tends to the oppression of the debtor; is a cover for usury, and is without consideration and contrary to public policy, and void.

## 2. SAME—BANK CHARTER.

Such a stipulation in a note discounted by a national bank is void, for the further reason that it is in excess of the powers of the bank under its charter.

## 3. SAME—POINT NOT DECIDED.

Whether such a stipulation in a note discounted by a national bank has the effect to avoid the whole instrument, not decided.

At Law.

*B. C. Brown*, for plaintiff.

*M. M. Cohn*, for defendants.

CALDWELL, D. J. The Merchants' National Bank of Little Rock brought suit in this court against the defendants on a note of which the following is a copy:

"\$500.

LITTLE ROCK, ARKANSAS, January 7, 1880.

"Sixty days after date, we, or either of us, promise to pay to the order of the Merchants' National Bank \$500, for value received, negotiable and payable without defalcation or discount at the Merchants' National Bank of Little Rock, Arkansas, with interest from maturity at the rate of 10 per cent. per annum until paid; and in the event payment is not completely made at maturity, the undersigned further agree to pay an attorney's fee of 10 per cent. on the amount due and unpaid if suit is brought to enforce payment of this note, and its interest, or any part that may remain due and unpaid, which said fee shall become due and recoverable in the action brought to enforce the payment of this note for the use of the attorney bringing said suit.

"A. H. SEVIER,

"T. J. CHURCHILL."

The defendant Churchill has filed a demurrer to the complaint, assigning several grounds of demurrer, but all based on the stipulation contained in the note to pay an attorney's fee. The effect of inserting such a stipulation in a promissory note has been much discussed by the courts. Adjudged cases may be found supporting every conceivable view of the question. One line of cases holds that such a stipulation is a penalty, and does not make the note usurious, because the maker has the right to pay the principal and avoid the penalty. *Cutler v. How*, 8 Mass. 257; *Lawrence v. Cowles*, 13 Ill.

577; *Billingsley v. Dean*, 11 Ind. 33; *Gaar v. Louisville Banking Co.* 11 Bush, 180. Other cases hold that it destroys the negotiability of the note, making it a mere contract. *Banking Co. v. Gay*, 63 Mo. 33; *First Nat. Bank of Carthage v. Jacobs*, 73 Mo. 35; *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank of Carthage v. Marlow*, 71 Mo. 618; *Woods v. North*, 84 Pa. St. 407; *Farquhar v. Fidelity Ins. Co.* (U. S. C. C. D. Pa.) 35 Leg. Int. 404; S. C. 7 Cent. Law J. 334; *Jones v. Radatz*, 27 Minn. 240; S. C. 11 Cent. Law J. 512; [S. C. 6 N. W. Rep. 800.] And in others, it is held that it does not affect its negotiability. *Seaton v. Scovill*, 18 Kan. 435; S. C. 5 Cent. Law J. 184; *Stoneman v. Pyle*, 35 Ind. 103; *Sperry v. Horr*, 32 Iowa, 184; *Howenstein v. Barnes*, 5 Dill. 482; 1 Daniel, Neg. Inst. 49.

Some courts hold that such a stipulation is valid and will be enforced. *Clawson v. Munson*, 55 Ill. 394; *Smith v. Silvers*, 32 Ind. 321; *McIntire v. Cagley*, 37 Io. 676; *Siegel v. Drum*, 21 La. Ann. 8; *Wilson Sewing-mach. Co. v. Moreno*, 6 Sawy. 35; S. C. 7 FED. REP. 806; 1 Daniel, Neg. Inst. 49. Other courts, whose opinions are entitled to the highest consideration, hold that such a provision is a stipulation for a penalty or forfeiture, tends to the oppression of the debtor and to encourage litigation, is a cover for usury, is without any valid consideration to support it, contrary to public policy, and void. *Bullock v. Taylor*, 39 Mich. 137; *Meyer v. Hart*, 40 Mich. 517; *Witherspoon v. Mussulman*, 14 Bush, 214; *Shelton v. Gill*, 11 Ohio, 417; *Martin v. Trustees Belmont Bank*, 13 Ohio, 250; *Dow v. Updike*, 11 Neb. 95; [S. C. 7 N. W. Rep. 857;] 2 Pars. Notes & Bills, 414. And see to same effect note to *Jones v. Radatz*, 11 Cent. Law J. 513; 12 Cent. Law J. 337; 14 Amer. Law Rev. 858, where it is said:

"It seems to us to be more consistent with public policy to consider all such agreements as absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be made under the guise of an attorney fee."

The doctrine of the cases last cited accords with sound reason and justice, and has our approval. It would serve no useful purpose to review the cases in detail. There is nothing new to be said upon the subject. The comprehensive and forcible reasoning of Mr. Justice COOLEY in *Bullock v. Taylor*, *supra*, cannot be successfully answered:

"A stipulation for such a penalty, we think, must be held void. It is opposed to the policy of our laws concerning attorneys' fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression.

It would be idle to limit interest to a certain rate, if, under another name, forfeitures may be imposed to an amount without limit. The provision in those notes is as much void as it would have been had it called the sum imposed by its true name of forfeiture or penalty. There is no consideration whatever that can support it."

The cases which treat such a stipulation as an agreement to pay liquidated damages, and not as a forfeiture or penalty, are unsound in principle. Their reasoning destroys the efficacy of every statute and rule of decision intended to protect debtors from the demands of grasping creditors. If a stipulation for an attorney's fee can be upheld upon the ground that it is a valid agreement upon sufficient consideration for the payment of a liquidated sum, it is not perceived why a stipulation to pay the taxes of the payee, or his office rent, or the salary of his collector, or all of these and as many more as the genius of a rapacious creditor may devise, should not be upheld and enforced by the same mode of reasoning. Mr. Justice SHARSWOOD, in *Woods v. North*, *supra*, following Chief Justice GIBSON, characterizes such a provision as "luggage," which negotiable paper is unable to carry, and pertinently inquires: "If this collateral agreement may be introduced with impunity, what may not be?"

In Daniel, Neg. Inst. 49, it is said this inquiry "is answered by the assertion that such provisions facilitate rather than incumber the circulation of such instruments; they are not 'luggage,' but ballast." Mr. Daniel's assertion is in the teeth of many adjudged cases, among which are well-considered judgments of such eminent jurists as Chief Justice GIBSON, Mr. Justice SHARSWOOD, and Mr. Justice COOLEY. It will require something more than assertion to overthrow a doctrine supported by such high authority. Undoubtedly, if it is once understood that courts will uphold and enforce such stipulations, we shall presently see notes so weighed down with this kind of "ballast," that the provisions to pay the debt and interest will be but a part of the obligation incurred by the debtor in signing the note. The "ballast" will become of more importance than the ship itself. The plaintiff in this case lately sued on a note in this court which contained a stipulation "to pay the attorney's fee, court costs, and all other expenses in enforcing the collection of this note," and it was gravely insisted in argument in that case that the defendant was liable to pay the hire of a horse and buggy, and the wages and expenses of the plaintiff's collector for the time consumed in going to demand payment of the note after it fell due. And if the reasoning in *Mc-*

*Intire v. Cagley, supra*, and other cases of that kind is sound, the contention in the case mentioned would not seem to be extravagant.

The suggestion of some of the courts, which maintain the validity of such a provision, that the fee stipulated for must be reasonable in amount, and that the court should reduce it when in its opinion it is excessive, only proves the unsoundness of the doctrine. For if the parties can lawfully stipulate for the payment of an attorney's fee, in addition to the principle and interest of the debt, and the costs and fees allowed by law, then they can agree upon the amount of the fee, and the court has no more power over such a contract than it has over any other contract entered into between parties capable of contracting. Interest is the only damages the law allows for delay in the payment of money, (*Loudon v. Taxing District*, 104 U. S. 771,) and in case of suit the only fees and costs that can be recovered are those allowed by law.

But if it were conceded that natural persons had the right to insert such a provision in a note, it does not follow that the plaintiff in this case would have that right. The plaintiff and payee in the note is a national bank. Corporations have only such powers as are specially granted by the act of incorporation, or as are necessary for carrying into effect the powers expressly granted. The specific power given to national banks is "to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes."

In *Nat. Bank v. Johnson*, 104 U. S. 277, the supreme court, construing this clause of the charter, say: "So the discount of negotiable paper is the form according to which they are authorized to make the loans; and the terms 'loans' and 'discounts' are synonyms." And it is further said in the same case that "the sole particular in which national banks are placed on an equality with the natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make. \* \* \*

The authority given to the bank by its charter to make loans and discounts, contemplates loans and discounts as understood in commercial law, and according to the known usage and practice of banks. Applying these tests, we find such a stipulation is no part of a negotiable promissory note or bill of exchange.

It is a significant fact that of all the forms of bills and notes given in the books, not one contains such a provision. It is comparatively

of modern origin. It is the invention of cunning shavers, and one of the methods by which they seek to fleece their victims. It is an exotic in commercial and banking circles, where business is conducted according to commercial usage, and with that integrity and fairness usually characterizing the dealings of banks and business men. This is the first instance that has come under our observation where this bad invention has found its way to the discount board of a national bank.

The exigencies of a bank may require the speedy negotiation of its securities to raise money to meet runs or other unexpected demands upon its vaults, and no stipulation in its securities, acquired by loan or discount, should be sanctioned which would render them non-negotiable, or of doubtful negotiability or validity. "The discount of *negotiable* paper is the form according to which they are authorized to make their loans." *Nat. Bank v. Johnson, supra*. The national banking act requires loans to be made "on personal security," and the uniform usage and practice of banks, conducted on sound banking principles, is to make their loans on short time and require payment or renewal at maturity. But if a bank is permitted to insert such a stipulation in its notes, it is obvious that the attorney of the bank, one of its most important and influential advisers and agents, at once becomes interested in having the makers of every note containing the stipulation make default in payment. It will be observed that the provision is that the 10 per cent. shall be "for the use of the attorney bringing the suit." This is offering the attorney of the bank a premium of 10 per cent. on all overdue notes upon which "suit is brought." The inevitable tendency is to foment and encourage litigation, which the law abhors.

That such a stipulation is in excess of the power of a national bank is shown by that provision of the national banking act which declares that the discount of a bill of exchange, payable at another place than the place of such discount, at the current rate of exchange, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than is allowed by the act. Section 5197, Rev. St. If this express provision was deemed necessary in order to enable banks to stipulate for the payment of the current rate of exchange between the place where the bill is discounted and the place where it is payable, it cannot be maintained, with any fair show of reason, that banks possess the implied power to stipulate for an attorney's fee of 10 per cent. if the bill is not paid at maturity. The power to insert such a provision is not given in express terms, and

cannot be implied. It is not necessary to the exercise of any legitimate function of the bank, and is contrary to the usage and practice of banks conducted on sound and legitimate banking principles. And in addition, therefore, to the reasons which render such a stipulation void where the payee is a natural person, it is void in the case of the bank for the further reason that it is in excess of the powers of the bank under its charter. The question whether such a stipulation has the effect, in the case of a national bank to avoid the whole instrument, was waived by counsel, and will not be considered by the court.

Let the plaintiff have judgment for the principal and interest of the note, and no more.

MCCRARY, C. J. I fully concur in the conclusion announced in the foregoing opinion, and in the reasoning by which it is supported. In construing and enforcing contracts made or to be performed in a state where a different rule has become established law, I might be inclined to abide by the local adjudications, but the doctrine of the foregoing opinion will be followed in all cases not falling within this exception, unless the supreme court shall otherwise decide.

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It is common, especially in the west, to write provisions in promissory notes and bills of exchange agreeing to pay, besides principal and interest, a sum for attorney fees or other expenses of collection. Sometimes a percentage of the principal is so agreed to be paid; again only "reasonable" fees or expenses are stipulated for. These provisions will be considered with reference to—

I. COSTS.

II. USURY.

III. PENALTY.

IV. CERTAINTY OF AMOUNT AND NEGOTIABILITY.

I. COSTS. It has been questioned whether a stipulation in a note for attorney fees is valid as an allowance of costs agreed upon by the parties. In Nebraska an allowance of stipulated attorney fees as costs appears to have been sanctioned by statute. Gen. St. Neb. 98; *Heard v. Dubuque Co. Bank*, 8 Neb. 13. But when this statute was repealed, the supreme court of Nebraska, in *Dow v. Updike*, 11 Neb. 97, intimated that such fees were not allowable as costs. "Costs are not allowed in this state unless authorized by statute," said the court. This decision followed *State v. Taylor*, 10 Ohio, 378, wherein it was said that "at common law no costs were allowed. If a plaintiff failed in his action, he was amerced for his false clamor, but costs were not adjudged against him. In Ohio, no costs are given to a successful party unless authorized by statute," etc. The supreme court of Michigan, in *Bullock v. Taylor*, 39 Mich. 140, passing upon the question, say: "In this state the attorney's

fees which the successful party is permitted to recover in courts of record are prescribed by statute or by rule of court. In justices' courts none are given, except in a few special cases. The policy of our law is to limit such recovery to a very moderate sum, in every case where it is permitted at all. \* \* \* And it is a question of very grave importance whether the policy which thus limits attorney's fees \* \* \* can be set aside by provisions like that under review." The stipulation was held void, because, among other reasons, "it is opposed to the policy of our laws concerning attorney's fees," etc., per COOLEY, J. This was affirmed by the same court in *Myer v. Hart*, 40 Mich. 522, wherein it was objected that the provision for payment of an attorney fee fixed its amount arbitrarily, without regard to the services performed, and also that it tended to hasten the commencement of proceedings and to promote litigation. The drift of these authorities is obviously against the allowance of stipulated attorney fees as costs.

Judge DEADY, in *Bank of British North America v. Ellis*, 6 Sawy. 105, took a different view. "At common law," said he, "the compensation of an attorney consisted in the various items allowed for his services, called collectively his 'costs;' and in case his client prevailed in the action these were collected off the adverse party as a part of the judgment."

"Substantially this stipulation for an attorney's fee is a substitute for the allowance of costs at common law, and enables a party taking a negotiable instrument to provide, by agreement with the maker or indorser thereof, that if the same is not paid without suit, the holder shall recover his attorney's fee, as well as the principal and interest."

The supreme court of Indiana, in *Billingsley v. Dean*, 11 Ind. 331, (affirmed in *Churchman v. Martin*, 54 Ind. 387,) took the view that "the agreement \* \* \* is reasonable, and there is certainly no good reason why an agreement on the part of the debtor to pay an expense resulting from his own act should not be valid in law."

These conflicting cases leave the question in a somewhat unsatisfactory state. It is believed, however, that a stipulation in a note to pay attorney's fees is not invalid as an agreement to pay costs. The decisions holding it to be invalid are not conclusive, because in each of them the invalidity was ultimately rested upon other grounds. What is said as to the invalidity of the stipulation, as an agreement to pay costs, is merely *obiter*. Reason seems to favor the validity of such an agreement. Why should not a debtor pay expenses which his failure to meet his obligations occasioned? Why may he not be permitted to agree so to do? The law sanctions such agreements in mortgages. *Hitchcock v. Merrick*, 15 Wis. 522; *Cox v. Smith*, 1 Nev. 161; *Bronson v. La Crosse R. Co.* 2 Wall. 283; *Pierce v. Kneeland*, 16 Wis. 672; *Simon v. Haifleigh*, 21 La. Ann. 607; *Rawson v. Hall*, 56 Me. 142; *Rice v. Cribb*, 12 Wis. 179; *McLane v. Abrams*, 2 Nev. 199; *Clawson v. Munson*, 55 Ill. 334; *Thalen v. Duffy*, 7 Kan. 405; *Williams v. Meeker*, 29 Iowa, 292; *Nelson v. Everett*, 29 Iowa, 184; *Sharp v. Baker*, 11 Kan. 381; *Jones v. Schulmeyer*, 39 Ind. 119; *Maus v. McKillip*, 38 Md. 241; *Whitmore v. Reynolds*, 46 Cal. 380. Reasoning by analogy, it is difficult to perceive why, if a stipulation to pay attorney's fees and other expenses of suit is valid in a mortgage, such a stipulation is not valid in a note or bill of exchange.



The point was decided in *Miner v. Paris Exchange Bank*, 53 Tex. 561, wherein the stipulation to pay the usual attorney's fees in the event suit had to be instituted to enforce the contract was held legal, and founded on a valuable consideration. Such fees, it was said, though not an element of damages in an ordinary suit for the collection of money, could be made such by an express contract. Assuming the stipulation to be valid, it has been held not to apply to the expenses incurred in ordinary dunning. *Wetherbee v. Kusterer*, 41 Mich. 359. The prosecution of the claim against the estate of the maker, where payment is resisted by the administrator, is such an action as will authorize the allowance of the stipulated fee for collection. *Davidson v. Vorse*, 52 Iowa, 384.

The court cannot fix the amount to be allowed as fees or costs without evidence thereof. *Wyant v. Pottorf*, 37 Ind. 513; *First Nat. Bank v. Krance*, 50 Iowa, 236.

The stipulation in the note or bill is for the benefit of the parties to the instrument, and not for the use of the attorney who may collect it. He cannot sue upon it. As to him it is a promise without consideration; a nude pact.

II. USURY. It has been asked whether a stipulation to pay attorney fees, or other expenses of collecting a note or bill of exchange, does not render it usurious. Several decisions reply affirmatively. Thus in Virginia, (*Toole v. Stephen*, 4 Leigh, 581;) and in Nebraska, (*Dow v. Updike*, 11 Neb. 95,) wherein Mr. Chief Justice MAXWELL held the stipulation void as usurious, saying: "The reason is, the law fixes a limitation to the amount to be paid for the use of money. If the borrower may be compelled to pay 10 per cent. collection fees in addition to lawful interest, in case suit is brought, could not a contract to pay 10, 20, or greater per cent., as liquidated damages, in case of a failure to pay promptly at the day the debt became due, be enforced, and thus the law regulating the rate of interest be virtually repealed?"

A similar view was taken in *Bullock v. Taylor*, 39 Mich. 140, wherein it was stipulated to pay an attorney fee of \$15 dollars each for collecting notes of \$41.50 each. "These stipulations," say the court " \* \* \* provided for the payment of a sum equal to 35 per centum, however brief might be the period of default. \* \* \* It would be idle to limit interest to a certain rate, if under another name forfeitures may be imposed to an amount without limit."

The question came before the United States circuit court in *Wilson S. M. Co. v. Moreno*, 6 Sawy. 38. Said DEADY, J.: "The ruling that such a stipulation makes the note usurious is founded upon the unauthorized assumption of fact that the sum agreed to be paid as attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction, it should be treated accordingly. But the fact cannot be assumed any more than that a like sum of the alleged principal is illegal interest in disguise. Accordingly, the tendency of the decisions hostile to this stipulation is to leave these untenable grounds, and hold it void upon the ground that it is a convenient device for usury, and tends to the oppression of the debtor; and it may be admitted that this suggestion is not without force, particularly in cases where the amount provided is largely in excess of what such collec-

tion could ordinarily be made for. But a court assumes to make the law, rather than declare it, when it pronounces such a contract void, not because it is prohibited or intrinsically wrong, but because it may be used as a cover for usury and a means of oppressing the debtor." In this case the stipulation was not held usurious.

Nor is the money or percentage agreed to be paid believed to be usury. Usury is the taking of more for the use of money than the law allows. Now, the sum agreed to be paid by the stipulations under discussion is not paid for the use of money, but for the expense of collecting it. If there is no expense incurred therein the debtor need pay nothing. He may avoid it by paying his obligation with lawful interest at maturity. The point was directly decided in *Gaar v. Louisville Bkg. Co.* 11 Bush, (Ky.) 189, wherein the stipulation was held not to be an agreement to pay usurious interest. But the court thought it was an agreement to pay a penalty, (and to the same effect, see *Witherspoon v. Musselman*, 14 Bush, 214; *Rilling v. Thompson*, 12 Bush, 310; *Thommasson v. Townsend*, 10 Bush, 114,) and pointed out the difference between usury and penalty. "Whenever the debtor," said the court, "by the terms of his contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day the contract is not usurious, but the difference between the two sums is a penalty; *Blydenburg, Usury*, 39; *Cullen v. How*, 8 Mass. 257; *Moore v. Hilton*, 1 Dev. Eq. 429; *Tyler, Usury*, 97; *Jordan v. Lewis*, 2 Stewart, 426. But when he cannot discharge his contract, according to its terms, at maturity, by the payment of the debt and lawful interest, the contract is usurious."

It is concluded that stipulations to pay attorney fees and similar expenses are not agreements to pay usury. But if the note is in other respects usurious, the attorney fee cannot be recovered; the usury vitiates the entire contract. *Miller v. Gardner*, 49 Iowa, 234.

III. PENALTY. As just stated, these stipulations have been held to provide for penalties. *Gaar v. Louisville Bkg. Co. supra*. They do not, however, amount to provisions for stipulated damages over which the courts have no control. This was decided by Mr. Justice SHARSWOOD in *Daly v. Maitland*, 88 Pa. St. 384. Said he: "This principle of liquidated damages is not applicable to a contract for a loan of money; at least, such stipulation is subject to the control of courts of equity." The same jurist, in *Woods v. North*, 84 Pa. St. 407, said again: "It is a mistake to suppose that if the note was unpaid at maturity, the 5 per cent. would be payable to the holder by the parties. It must go into the hands of an attorney for collection. It is not a sum necessarily payable. The phrase "collection fee" necessarily implies this. Not only so, but this amount of percentage cannot be arbitrarily determined by the parties. It must be only what would be a reasonable compensation to an attorney for collection. This, in reason and the usage of the legal profession, depends upon the amount of the note. Five per cent. would probably be considered by a jury as a reasonable compensation upon the collection of a note of \$377. But if it were \$3,000 they would probably think otherwise, and certainly so if it were \$30,000."

In *Johnston v. Speer*, 92 Pa. St. 228, a stipulation to pay attorney's commissions was held equivalent to a contract to pay damages—reasonable damages,

or such damages as a court at its discretion might fix. Whence it is concluded that as penalties these agreements to pay costs and attorney fees are not enforceable; that is to say, where 5, 10, or any other percentage, or any specified sum, is stipulated to be paid, the courts will not compel the payment of that sum absolutely, but only so much of it as amounts to reasonable fees or expenses.

IV. CERTAINTY OF AMOUNT AND NEGOTIABILITY. A number of cases present the question whether the insertion in a note or bill of exchange of an agreement to pay attorney fees, or other expenses of collection, renders the instrument uncertain in amount and destroys its negotiability.

The point was decided in *First Nat. Bank v. Gay*, 63 Mo. 33. As to the matter of certainty of amount in a negotiable instrument the court said, "no little stringency is exhibited by the cases." The instrument was held "not precise as to the amount to be paid" and not "a promissory note." The court admitted that some authorities held differently, but it regarded them "as seriously endangering elementary principles and definitions."

The supreme court of Pennsylvania spoke more definitely. In *Woods v. North*, 84 Pa. St. 407, it decided that the insertion in a promissory note of the clause "and 5 per cent. collection fees if not paid when due," rendered the note uncertain in amount, destroyed its negotiability, and relieved the indorser from liability thereon. Said Mr. Justice SHARSWOOD: "But in the paper now in question there enters as to the amount an undoubted element of uncertainty." He then pointed out that the stipulation for 5 per cent. could not be enforced, except to compel the payment of reasonable fees or expenses, the amount of which would have to be determined by a jury, and consequently that such amount was an uncertain sum. "How, then," continued he, "can this note be said to be certain as to its amount, or that amount unaffected by any contingency? Interest and costs of protest, after non-payment at maturity, are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. Neither does a clause waiving exemption, for that in no way touches the simplicity and certainty of the paper. But a collateral agreement, as here, depending too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may be well characterized, like an agreement to confess a judgment was by Chief Justice GIBSON, as 'luggage' which negotiable paper, riding as it does on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions, and litigation result. It is the best rule, *obsta principiis*." The preceding decisions are sustained by the following authorities: *Johnston v. Speer*, 92 Pa. St. 227; *First Nat. Bank v. Bynum*, 84 N. C. 24; *First Nat. Bank v. Marlow*, 71 Mo. 619; *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank v. Jacobs*, 73 Mo. 35; *Farquhar v. Fidelity, etc., Deposit Co.* 7 Cent. Law J. 334; *Jones v. Radatz*, 27 Minn. 240.

In Indiana a statute was enacted "that any and all agreements to pay attorney fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evi-

dence of indebtedness, are hereby declared illegal and void." 1 Rev. St. Ind. 1876, p. 149, act March 10, 1875. The supreme court of Indiana said that to prohibit the making of certain contracts is not to impair the obligation of contracts already in existence. It decided the statute constitutional, and held that an agreement in a note to pay "10 per cent. attorney fees if suit be instituted on this note," was illegal and void under this statute. This was in *Churchman v. Martin*, 54 Ind. 388. But the court evinced no disposition to construe this statute liberally, for in the same case it decided that a stipulation to pay 5 per cent. expenses of collection *other than attorney fees* was not within the statutory prohibition, and was valid. So, also, a clause in a note, by which the maker *unconditionally* agreed to pay 5 per cent. attorney fees, was held not within the statute, which, it was pointed out, required the agreement to be conditional, and the condition to be inserted in the instrument. The same position was taken in *Brown v. Barber*, 59 Ind. 533; *Smock v. Ripley*, 62 Ind. 81; *Garven v. Pontius*, 66 Ind. 192; *Tuley v. McClung*, 67 Ind. 10,—all these cases holding that an unconditional stipulation to pay attorney fees or expenses of collection is valid, and does not destroy the negotiability of the note.

In *Nelson v. White*, 61 Ind. 139, a promissory note, secured by mortgage, and containing a conditional stipulation to pay attorney's fees, had been executed before the enactment of the above statute, but was afterwards altered by the consent of all parties by increasing the rate of interest, and then executed by an additional maker as surety for the first maker, whereupon the mortgage was released. On appeal by the principal alone, it was decided that such alteration did not as to him merge the note as originally executed into a new one, and he was held liable for the attorney fees.

The validity of attorney fee or expense clauses in notes and bills was passed upon by the Indiana court before the enactment of the statute, and, of course, without regard to it, in *Stoneman v. Pyle*, 35 Ind. 104, wherein are instruments stipulated for the payment of attorney's fees in case suit should be commenced on it. Said the court: "It may be conceded that a note, in order to be placed upon the footing of bills of exchange, must be for a sum certain; for in no other way can the maker know precisely what he is bound to pay, or the holder what he is entitled to demand. But the note in question, if paid at maturity, or after maturity, but before suit brought thereon, is for a sum certain. On the maturity of the note the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. In the commercial world, commercial paper is expected to be paid promptly at maturity. The stipulation for the payment of attorney's fees could have no force except upon a violation of his contract by the defendant. Had the defendant kept his contract and paid the note at maturity, or afterwards, but before suit, he would have been required to pay no attorney's fees, nor would there have been any difficulty as to the extent of his obligation." The case was said to be analogous to a class of usury cases, wherein it is decided not to be usury which will invalidate the contract to require, as a penalty for failure to pay at maturity, the payment of a sum as extra interest, because the borrower may pay the principal and avoid the penalty. "So here," the court said, "the defendant had the right to pay the face of the note when due and avoid

attorney's fees. As long as the note retained the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand, and recovered on the other, was fixed and definite."

To the same effect is *Billingsley v. Dean*, 11 Ind. 331; *Strough v. Gear*, 48 Ind. 100; *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Hubbard v. Harrison*, 38 Ind. 323; *Wyant v. Pattorf*, 37 Ind. 513; *Walker v. Woolen*, (Ind.) 4 Cent. Law J. 248.

The same views were held in Iowa in *Sperry v. Horr*, 32 Iowa, 184; the court saying, besides, "that this agreement relates rather to the remedy upon the note, if a legal remedy be presumed, to enforce its collection than to the sum which the maker is bound to pay. It is not different in its character from a *cognovit* which, when attached to promissory notes, does not destroy their negotiability."

To the same effect see, also, *Nelson v. Everett*, 29 Iowa, 24; *Weatherby v. Smith*, 30 Iowa, 131; *McGill v. Griffin*, 32 Iowa, 445; *McIntire v. Cagley*, 37 Iowa, 676.

In Illinois, *Nickerson v. Sheldon*, 33 Ill. 372, holds that an instrument promising to pay a specific sum, "and \$10 in addition \* \* \* for attorney fees," is a valid promissory note.

In Oregon the United States circuit court holds valid such stipulations, and the notes or bonds containing them. *Wilson S. M. Co. v. Moreno*, 6 Sawy. 35; *Bank of British N. A. v. Ellis*, Id. 96.

So it is also held in Louisiana. *Dietrich v. Baylie*, 23 La. Ann. 767.

And in Kansas, *Seaton v. Scovill*, 18 Kan. 435; and so in *Howenstein v. Barns*, 5 Dill. 484, by the United States circuit court.

In *Morgan v. Edwards*, 53 Wis. 599, the instrument sued on was a promise to pay B. or order on a day and at a bank named a specific sum of money; and, further, a promise "to pay all expenses, including attorney's fees incurred in collecting," etc. It was decided that the two promises were inseparable parts of the same instruments; that the second promise bound the promisor to pay, not merely the expenses of enforced collection after maturity, but whatever expense may accrue to the holder in receiving payment at maturity; and that as such expenses were of an uncertain amount, the instrument was not a negotiable note. The court, however, expressly refrained from expressing its opinion whether a promise in an instrument to pay the expense of collecting it after maturity, or *by suit*, would destroy its negotiability. But this latter point was decided in *Gaar v. Louisville Banking Co.* 11 Bush, (Ky.) 182, wherein a bill of exchange had an indorsement on the back of it, by which the drawer, drawee, payee, and one indorser agreed "to pay a reasonable attorney's fee to any holder thereof, if the same shall hereafter be sued upon." It was decided to be valid and negotiable. "The reason for the rule that the amount to be paid must be fixed and certain," said the court, "is that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due, it ceases to have that peculiar quality denominated negotiability, or to perform

the office of money; and hence anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in nowise affected it until after it had performed its office, cannot prevent its becoming negotiable paper. Until the paper in question matured, the amount due upon it was fixed and certain, and it might, therefore, take the place of money. When it became overdue, that fact put an end to its career, and then for the first time the amount to which the holder was entitled became uncertain, or rather might be made uncertain by bringing an action on the bill against the parties who signed the agreement indorsed thereon."

Here, then, are two conflicting classes of cases, the first composed of cases decided by the supreme courts of Pennsylvania, Minnesota, Wisconsin, and Missouri, holding that a stipulation in an instrument to pay attorney fees or other expenses of collection makes the amount of it uncertain and destroys its negotiability; the second, composed of cases decided by the supreme courts of Indiana, (when not controlled by a statute,) Iowa, Illinois, Louisiana, Kansas, and Kentucky, and the United States courts in Oregon and in Kansas, affirming the contrary doctrine, viz., that such stipulations do not render the amount of the instrument uncertain, and do not destroy its negotiability. Clearly the weight of authority is in favor of the negotiability of instruments containing the stipulations. The true principles applicable to instruments containing these stipulations appear to be these:

The amount payable by a negotiable instrument *at maturity* must be certain.

If this amount is made uncertain by a clause in the instrument requiring the payment *at maturity* of an indefinite sum as attorney fees or collection expenses, besides principal and interest, then the instrument is rendered not negotiable on account of uncertainty in amount. Being not negotiable, indorsees cannot sue upon the instrument, nor are indorsees liable to be sued on their contract of indorsement of it. But the payee may sue the maker upon the instrument.

If the amount payable at maturity is certain, it is not rendered uncertain by a stipulation to pay indefinite attorney fees or expenses to be incurred and paid *after maturity*. Such a stipulation does not destroy the negotiability of the note or bill. This conclusion is contrary to the decision in the principal case of *Hardin v. Olson*, but is believed, nevertheless, to be sound law. It is clearly reasonable, and is sustained by the great preponderance of authority.

Interesting questions are whether, supposing the note or bill to be negotiable, indorsers are liable to pay attorney fees and expenses of collection, or whether only the maker incurs this liability. And whether indorsees, as well as the payee, may collect such expenses from the maker, or, if they are liable, from the indorsers. In *Bullock v. Taylor*, 39 Mich. 139, the court say that if the agreement is valid, and constitutes a part of the obligation of the makers upon which a recovery may be had in a suit owing on the note, then it will be conceded the notes which contain it are not within the obligation the surety has assumed. The surety undertook for the payment of the price of the goods to be sold, and not for any failure to pay promptly, and his promise cannot be enlarged in any particular without his consent. This is merely *dicta*, however.

In *Ware v. City Bank*, 59 Ga. 841, the action was by the holder of a draft embracing within it a factor's lien on the drawer's growing crops and personality to secure the repayment of the advance, and 10 per cent. counsel fees. This agreement was decided to be altogether between the drawer and the acceptors, and to relate to the enforcement of the lien. The action being by the holder (indorsee) of the draft, the court directed that the attorney's fees be disallowed.

In *Short v. Coffeen*, 76 Ill. 245, it is said that when a note requires the maker to pay attorney's fees in case of suit, it *seems* the assignor (indorser) of such note is not liable for the fee in a suit against him.

These cases do not decide the instrument not to be negotiable, but rather imply the contrary, the decisions being confined to the enforcement of the stipulation considered as a separate contract from the note or bill in which it is written.

There does not seem to be any good reason why one who indorses a promissory note should not be held liable to perform all the promises contained in it. This is the view taken in 1 Dan. Neg. Inst. § 62, where it is said that the liability for the attorney fee, "as for every engagement imported by the bill or note, enters into the acceptor's and indorser's contract."

In *Smith v. Muncie Nat. Bank*, 29 Ind. 158, an acceptor of a bill of exchange was held liable. In *Hubbard v. Harrison*, 38 Ind. 323, the liability was enforced against a payee who was in fact an accommodation indorser. Judge DEADY holds that such a stipulation passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible in like manner for such fee to each and every subsequent holder thereof. *British Bank of N. A. v. Ellis*, 6 Sawy. 97.

In the principal case of *Hardin v. Olson*,\* the federal court follows a decision by the supreme court of Minnesota, and in *Howestein v. Barnes*, 5 Dill. 484, the federal court followed a decision by the supreme court of Kansas. But the question is one of commercial law, as to which state decisions are not binding upon federal courts.

Chicago.

ADELBERT HAMILTON.

## HUBBARD v. NEW YORK, N. E. & W. INVESTMENT CO.†

(Circuit Court, D. Massachusetts. November 15, 1882.)

### 1. CORPORATION—CONTRACT WITH DIRECTOR.

If a contract made by a director with the corporation of which he is director is to be construed so as to cover a transaction granting to him enormous commissions, without regard to the debts or other liabilities of the company, it is unreasonable as affecting injuriously the rights of the stockholders, and giving one director of the company a right without regard to the rights of creditors or the liabilities of the company, and is unreasonable and beyond the power of the directors to make with their co-directors.

\*See post, p. 705.

\*Affirmed. See 7 Sup. Ct. Rep. 352.

2. SAME—WHO DEEMED A DIRECTOR.

A contract which provides that plaintiff was to be chosen one of the directors of defendant corporation, and by its express terms he was to be invested with the duty of superintending and directing its affairs as one of its directors, must be construed as if he was actually a director at the time of its inception, and as if made with him while he was a director.

3. SAME—WHEN VOID—WANT OF AUTHORITY.

Directors of a corporation are its trustees, and the validity of their contracts made with a corporation depends upon the nature and terms of the contract itself, and the circumstances under which it is made, and the effect of its provisions; and if they are pernicious, and tend to work a fraud on the rights of the corporation and the stockholders, the directors have no authority to enter into it.

4. SALES—COMMISSIONS—WHEN NOT DUE.

Where plaintiff was not a broker, and there was no express contract and no circumstances from which it can be concluded that any kind of an implied contract existed between the defendant company and plaintiff by which he was to have a commission on the sale of a railroad effected by defendant's corporation, he is not entitled to recover any compensation.

*R. D. Smith and W. W. Vaughan, for plaintiff.*

*John W. De Ford and W. A. Munroe, for defendant.*

At Law.

NELSON, D. J., (*orally*.) I have taken the question that was argued yesterday into consideration, and I am now ready to announce my ruling.

The contract upon which the plaintiff's case is founded provides that the plaintiff was to be chosen one of the directors of the defendant corporation. It had in contemplation by its express terms that he was to be invested with the duty of superintending and directing its affairs as one of its directors, and was to have that relation to the company and its stockholders while he was performing his part of the contract. The contract must therefore be construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director. A director of a corporation is not absolutely prohibited by law from entering into a contract with the corporation through his co-directors. Whether such a contract is binding upon the corporation must depend upon its terms and the circumstances under which it was made. Owing to the peculiar relation which the directors owe to the corporation, being strictly trustees, and their position being in every sense fiduciary, their contracts with the corporation should be scanned, if not with suspicion, at least with the most scrupulous care. The validity of such a contract must therefore depend upon the nature and



terms of the contract itself and the circumstances under which it is made. The motives of the parties are not necessarily material, but the effect of the provisions of the contract must be especially regarded, and if they are pernicious and tend to work a fraud on the rights of the corporation and stockholders, in such case the directors must be regarded as having no authority to enter into it. In entering into this contract, I perceive no evidence in the case from which to infer that either the plaintiff or the board of directors had any purpose to perpetrate a fraud on the corporation, or to grant to the plaintiff any undue privileges; but still, if that was the effect of the contract, it cannot be maintained.

In passing upon the question whether the directors had authority to make this contract, I must assume its true construction to be what the plaintiff claims it is, and to embrace commissions to the amount which the contract itself provides upon the contract upon which the Burlington Railroad was sold to the Atchison Company. Now, it seems to me, in examining this contract, that there is very strong reason to conclude that the parties never had in contemplation the meaning which the plaintiff now contends should be given to it. It seems to me that the contract was intended by the parties to relate to a different class of transactions from that which is set forth in the declaration as the breach of the contract, upon which the plaintiff relies to maintain his action. They established by this contract a division, comprising four of the New England states, with an office in Boston, and placed the plaintiff at the head of the Boston office, intending to give to him the business originating and transacted within the four states.

Now it appears that the business which culminated in the sale of the railroad to the Atchison Company was a business which had originally come to the New York office. All the plaintiff did after the business had come to the New York office was this: He introduced the company to an agent of the Atchison Railroad, who resided in Boston. He made no contract between the Investment Company and the Atchison road for the sale of the Burlington road. His sole services in respect to the business consisted of his conversation with Mr. Thorndike, his interviews with Mr. Coolidge, the president of the Atchison road, and in making arrangements for a meeting between the directors of the company in New York and the agents of the Atchison road in Boston. The contract itself was made and concluded, its terms settled, and the contract perfected by the New York directors, and not by the plaintiff. The plaintiff's claim here rests upon the assumption that

the contract provided that he was entitled to his one-third of the gross profits resulting to the company upon this business, as his compensation for his services rendered in this particular instance; and although I have grave doubts whether that was a result which the parties intended and was embraced within the meaning of this contract, yet I am bound, in construing the contract as the case now stands, and upon the evidence now before the court, to assume that this particular business was within the terms of the contract.

If this contract is to be construed as granting to the plaintiff the enormous commission which he claims in this suit, one-third the gross profits of the company arising out of this transaction, without regard to the debts or the other liabilities of the company, I am of the opinion that it is a contract which the directors had no authority whatever to make with the plaintiff. The service which he actually performed seems to be simply that of a broker introducing a customer to his employer, through whom a contract was subsequently perfected. If the contract is to be construed so as to cover a transaction of that kind, it was one that was unreasonable as affecting injuriously the rights of the stockholders of the company, and giving one of the directors of the company a right, without regard to the rights of creditors, to say nothing of the rights of the stockholders, in the assets of the corporation, giving him a profit without regard to the liabilities; and being of this nature, it was not a reasonable and fair contract for one of the directors of this corporation to make with his co-directors.

It might be very well claimed, if this contract related merely to a commission on sales actually effected through the Boston office by the plaintiff, or actually originated and perfected within the four New England states embraced by the contract, that it would not be an unreasonable one, provided the results of it were reasonable, not affecting the general prosperity and solvency of the corporation. But if it is to be construed as covering transactions of this nature, where the enormous profit realized in this case would be divided in the proportion of two-thirds to the corporation and one-third to the director, it seems to me to be unreasonable, and a contract that ought not to be sustained. The services rendered by the plaintiff in this case were exceedingly slight. He met his friend, Mr. Thorndike, and called his attention to the road which the Investment Company had in its possession for sale. He subsequently communicated the result of these interviews to the directors of the Investment Company in New York, the result of which was that, subsequently, through the action of the

New York directors alone, this road was sold to the Atchison Company at a profit of something over \$100,000. To hold that a director could make a contract with his co-directors by which the gross profits on a transaction of that kind, and all transactions of a like nature, should be divided in the proportion in which it is claimed that this contract provides for, seems to me would be unreasonable and ought not to be sustained.

In regard to the claim of the plaintiff on the count on an account annexed, I am also of opinion that there is no evidence in the case upon which this count can be sustained. Mr. Hubbard very fairly states that what he did was done under the contract. This count is for commissions on this particular transaction. Mr. Hubbard was not a broker; he does not claim to have acted in any sense as a broker between the parties, under any contract that he was to receive a commission for his services; and, to hold that for the services which he rendered in this case he is entitled to recover any compensation, under the circumstances, seems to me to be altogether out of the question. He was not a broker; there was no express contract, and there are no circumstances from which it can be concluded that any kind of an implied contract existed between the Investment Company and the plaintiff by which he was to have a commission on this transaction.

I am of the opinion that the defendant is entitled to a verdict.

Mr. Smith. Your honor understands, of course, that we shall go up on that.

Judge Nelson. I understand that the plaintiff excepts to this ruling, and the exception will be allowed.

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The following decisions bear more or less upon the questions involved in the above case: *Blatchford v. Ross*, 5 Abb. Pr. (N. S.) 434; *Conro v. Port Henry Iron Co.* 12 Barb. 29; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Buffalo, etc., R. Co. v. Lampson*, 47 Barb. 533; *Morrison v. Ogdensburg & L. C. R. Co.* 52 Barb. 173; *Koehler v. Black R. F. I. Co.* 2 Black, 715; *Covington, etc., R. Co. v. Bowler*, 9 Bush, 469; *Alford v. Miller*, 32 Conn. 543; *Coons v. Tome*, 9 FED. REP. 532; *Stout v. Yeager* 13 FED. REP. 802; *Verplanck v. Merc. Ins. Co.* 1 Edw. Ch. 184; *Scott v. Depayter*, Id. 513; *Gray v. N. Y. & Virginia S. Co.* 3 Hun, 388; *Mayor of Griffin v. Inman*, 57 Ga. 370; *Bestor v. Wathen*, 60 Ill. 138; *Harts v. Brown*, 77 Ill. 226; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 283; *Port v. Russell* 36 Ind. 60; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Cumberland Coal Co. v. Parish*, 42 Md. 598; *European & N. A. R. Co. v. Poor*, 50 Me. 277; *Redmond v. Dickerson*, 9 N. J. Eq. 515; *Goodman v. Butler*, 30 N. J. Eq. 702; *Stewart v. Lehigh V. R. Co.* 38 N. J. Law, 505; *Claflin v.*

*Farmers' & C. Bank*, 25 N. Y. 293; *Butts v. Wood*, 37 N. Y. 317; *Ogden v. Murray*, 39 N. Y. 202; *Coleman v. Second Av. R. Co.* 38 N. Y. 201; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 329; *Blake v. Buffalo C. R. Co.* 56 N. Y. 485; *U. S. Rolling Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 450; *Robinson v. Smith*, 3 Paige, 222; *McAleer v. Murray*, 58 Pa. St. 126; *West St. L. Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Stark Bank v. U. S. Pottery Co.* 34 Vt. 144; *Cook v. Berlin Wool M. Co.* 43 Wis. 433.—[ED.]

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*Ex parte* ALEXANDER.

(District Court, N. D. New York. 1883.)

HABEAS CORPUS—REVIEW ON.

The circuit court cannot on *habeas corpus* look behind the record to review the proceedings of a court of co-ordinate jurisdiction

*Habeas Corpus.*

The defendant was indicted by a grand jury of the United States district court for the western district of Tennessee, on the twenty-seventh day of April, 1882, for receiving illegal pension fees on the first day of April, 1881. Subsequently he was found guilty, and sentenced to one year's imprisonment in the Erie county, New York, penitentiary. The case now comes before the court on writ of *habeas corpus*. In his petition for discharge the prisoner alleges that the offense for which he was sentenced was committed on the fifth or sixth day of February, when there was no law making it a crime, and not on the first day of April, as charged in the indictment.

*Zenas M. Swift*, for the prisoner.

*Martin I. Townsend*, Dist. Atty., for the United States.

COXE, D. J. The indictment charges the offense to have been committed on the first day of April, 1881, at a time when, it is conceded, section 5485 of the Revised Statutes was in force. The district court of Tennessee had jurisdiction. The jury found the facts as charged in the second count of the indictment. There is no irregularity appearing on the face of the record. This court cannot, on *habeas corpus*, look behind the record to review the proceedings of a court of co-ordinate jurisdiction, nor can it receive and act on extrinsic evidence. If the prisoner at the trial could have established the facts stated in his affidavit, they might have constituted a defense; but they cannot be considered here. If errors were committed on the trial, the law suggests a very different method of correcting them.

Discharge refused, and prisoner remanded.

## UNITED STATES v. ROSE.

(District Court, S. D. New York. December 21, 1882.)

## PENALTY—ACTION FOR—MODE OF PROCEDURE—SUMMONS, INDORSEMENT OF.

Actions for penalties brought in the name of the United States correspond with those brought by the state in the name of "The People of the State of New York;" and by section 914, U. S. Rev. St., the provisions of the New York Code of Procedure, in regard to such actions by "The people," etc., are applicable to similar actions brought here in the name of "The United States," and the summons served must therefore be indorsed with a general reference to the statute by which the action for the penalty is given. This indorsement is part of the process; and, being designed to give immediate notice of the nature of the action, is a material part; and, if omitted, is not amendable, and the service of the summons should be set aside.

## Motion to Set Aside Service of a Summons.

The action was for a penalty, alleged to have been incurred by the defendant under the provisions of section 4504, U. S. Rev. St. The summons was served without the complaint. The copy of the summons, which was delivered to the defendant, was not indorsed with any reference to the statute by which the penalty was given, as required by the New York Code of Civil Procedure, §§ 1897, 1964, and 1962. The *præcipe* to the clerk, upon which the summons was issued, contained only a pencil indorsement, "R. S. 4504." Defendant's attorneys appeared, reserving the right to move to set aside the summons; and, upon the complaint being served, made this motion.

*William C. Wallace*, Asst. U. S. Atty., for plaintiff.

*Goodrich, Dedy & Platt*, for defendant.

BROWN, D. J. Actions for penalties brought in the name of "The United States" correspond entirely with those brought by the state in the name of "The People," etc. Each represents the sovereignty which is plaintiff. Hence, when congress adopts (section 914, Rev. St.) the "forms and modes of proceeding" of the several states, an action by "The United States," brought in the state of New York, must be in the form and mode prescribed in this state for similar actions by "The People," etc.; and therefore a reference to the statute and penalty was required to be indorsed on the summons in this action, as prescribed by sections 1897, 1964, and 1962 of the New York Code of Procedure. These sections required an indorsement "upon the copy of the summons delivered in the following form: According to the provisions of, etc., adding such a description of the statute as will identify it with convenient certainty, and also specifying the section," etc.

The matter required to be indorsed is a substantial and material part of the writ, because designed to give immediate notice to the defendant of the nature of the action. The *præcipe* does not supply this notice, and was not a compliance with the statute. The summons having no indorsement was defective in a material part, and hence it is not amendable, and the service of the summons must be set aside. *Brown v. Pond*, 5 FED. REP. 31; *Peaslee v. Haberstro*, 15 Blatchf. 472; *Dwight v. Merritt*, 18 Blatchf. 305.

Motion granted.

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UNITED STATES v. SCHLESINGER and others.\*

(Circuit Court, D. Massachusetts. December 29, 1882.)

1. DUTIES ON IMPORTS—RECOVERY BACK—PROTEST AND APPEAL.

In an action to recover back duties illegally exacted, protest and appeal are necessary as a condition precedent to the right to recover, even when the United States are plaintiffs in an action to recover duties in excess of those already paid.

2. SAME—REMEDY OF IMPORTER.

Where the United States sue to recover duties upon importations of what is called steel in bars, which was entered and duties paid as upon "scrap steel," and the goods were delivered before the final liquidation, the defendants may set up facts which make the assessment illegal in such action, and are not bound to suffer judgment to be entered against them, and proceed by suit to recover back the amount paid at any time within 90 days thereafter, under the provisions of section 2931 of the Revised Statutes.

*Geo. P. Sanger*, U. S. Atty., for plaintiffs.

*L. S. Dabney* and *W. S. Hall*, for defendants.

LOWELL, C. J. Four cases, of which this is one, have been argued here within a short time, which bring up for review the decision in *U. S. v. Cousinery*, 7 Ben. 251. I shall criticise that case with as much freedom as if I had made it under like circumstances; that is, when the important considerations affecting the decision were not argued and escaped notice.

The cases here pending are of two kinds: those in which the United States sue for duties, and those in which the importers sue to recover back duties; and the learned counsel for the importers inform me that they are much embarrassed by the principal case. In the four cases now under advisement the importers had received delivery of their goods, and had paid the assessed or the estimated duties, and when a new liquidation was made, they protested and appealed, and

\*Affirmed. See 7 Sup. Ct. Rep. 442.

the decision of the secretary was against them. They have, therefore, taken all the steps prescribed by Rev. St. § 2931, which was formerly St. 30 June, 1864, § 14, (13 St. 213.) Now their embarrassment occurs in this way: *U. S. v. Cousinery* is decided upon the theory that the importer who has duly protested and appealed may pay and then recover back the amount illegally charged to him. This *ratio decidendi* is given on pages 255 and 256 of the report. But in a case like the present, where an importer has received all his goods, before the last liquidation is made, if he should pay the additional sum demanded and sue to recover back what was excessive, he would be met by the objection that he had paid voluntarily; and under a familiar principle of law he cannot maintain an action under those circumstances; while if he refuses to pay and is sued, *U. S. v. Cousinery* decides that he has no right to defend, but must pay and sue.

Nothing can be more familiar than the rules of law on the general subject of recovering money once paid. It would be an impertinence to cite authorities, and I shall cite none, except to show that the revenue laws lay down no different doctrine from that prevailing at the common law, but simply permit the common law to operate.

In *Elliott v. Swartwout*, 10 Pet. 137, the usual rule was applied that one who pays money extorted from him by a public officer who has in his possession property of the payer, so that he can enforce payment without suit, is at such a disadvantage that he is considered as paying under duress, and may recover back whatever was illegally exacted.

In *Cary v. Curtis*, 3 How. 236, the supreme court modified this rule by holding that a public officer who was absolutely bound to pay into the treasury every dollar which he received, so that he could not protect himself in case of suit, was not liable to an action. Congress, then in session, approved of the dissenting opinion of STORY and McLEAN, JJ., in that case, and promptly reversed this decision by St. 26 Feb. 1845, (5 St. 727.) This statute gave no new rights. It simply removed the obstruction of *Cary v. Curtis*, and left the importer to his remedy at common law. That remedy, of course, was to pay, if compelled by the retention of his goods, and then to sue. If he paid after his goods had been delivered, as, for instance, upon a bond, he could not recover, but should have resisted payment. *Marshall v. Redfield*, 4 Blatchf. 221.

So, when the internal-revenue acts were passed, it was a serious question whether the tax-payer had a remedy in court, because those

laws required the collector to make daily payments to the treasury without defalcation or deduction. See the remarks of NELSON, J., in *Cutting v. Gilbert*, 5 Blatchf. 259. But inasmuch as the statute, in some parts, took for granted that an action might be brought, it was held that the remedy at common law was preserved. *Philadelphia v. Collector*, 5 Wall. 720. The collector of internal revenue, unlike the collector of customs, has power to issue a summary warrant of distress. Therefore, at common law, a payment to him is compulsory, and as soon as the case I have last cited was decided, Judge SHIPMAN ruled in *Sheafe v. Ketchum*, 6 Int. Rev. Rec. 4, that if the plaintiff had paid to avoid a distraint of his property, and the tax was illegal, he could recover; so CLIFFORD, J., in two passages of the opinion, *Mandell v. Pierce*, 3 Cliff. 134, says that same thing. In the theory of the law the collectors of customs retain the goods or money until the duties are paid; but if they fail to keep this advantage, they have no coercive power.

It is safe to say, I think, that no case has been decided in which, under objection, a plaintiff has ever recovered of a collector, or of any one else, a payment which was not, in the legal sense, coerced. It is not mentioned in every case, because it is one of those familiar facts which are taken for granted.

Does the act of 1864, now Rev. St. § 2931, change all this? I think not. That act is not an enabling, but a limiting and restricting act. It does not purport to tell us when an action may be maintained, but only that the decision of the department shall be final unless certain things are done. It would be convenient for the importer, and, perhaps, for the United States, that the rule should be as assumed in *U. S. v. Cousinery*, but I cannot find it in the law; on the contrary, section 3011, which covers a part of the same ground, refers to a payment to obtain possession of the merchandise.

It is argued that section 2931 applies to certain tonnage dues and fees not mentioned in section 3011, as well as to duties. The same answer holds good that the statute does not say that all such fees and dues may be recovered back if there has been a protest and appeal, but that they never shall unless these steps have been taken. It is the fact that the collector has power to coerce the payment of all such demands by withholding clearances and papers, and if payment is made to obtain these, the money may be recovered if the charge was illegal or excessive, and due protest and appeal were made.

The statutes of 1839, (as amended,) of 1845 and 1864, are all to found in the Revised Statutes, so that the law now reads that the



collector shall pay into the treasury all moneys received by him, (Rev. St. §§ 3615, 3617;) that the importer who pays to obtain possession of his merchandise may recover back what is wrongly charged, (section 3011;) provided he makes such protest and appeal as the act of 1864 required, (sections 3011, 2931.) Who can doubt that in construing these sections together, as they must be construed, they leave to the tax-payer the right to recover back only when he has made due protest and appeal, and has been compelled to pay? My opinion would be the same if section 3011 had been omitted from the Revision; but its presence strengthens the argument.

I am of opinion, therefore, that in the two cases in which the importers paid without compulsion they cannot recover. Judge NELSON concurs in this opinion, and in the case lately tried before him will enter judgment for the collector.

This decision, by necessary intendment, gives the right to defend an action where the United States are plaintiffs. The learned judge who decided *U. S. v. Cousinery*, appears at a later time to have had his attention called to the fact that there might be cases of payment in which the importer could not sue, for in *U. S. v. Phelps*, 17 Blatchf. 312, he said, (page 315:)

"The only remedy of the importer is in a suit to recover back the duties after paying them, *in a case where such a suit is allowed*. This was the rule in *U. S. v. Cousinery*, 7 Ben. 251, in the district court for this district, following *Westray v. U. S.* 18 Wall. 322. Such ruling was approved by Chief Justice WARRE in *Watt v. U. S.* 15 Blatchf. 29, and must be held to be the law until it is reversed."

I have italicised the remark which I understand to mean that though one set of meritorious importers may have no remedy at all, yet that no remedy is their only remedy. The point is not decided in *Westray v. U. S.* 18 Wall. 322, nor in *Watt v. U. S.* 15 Blatchf. 29. The chief justice cites *Cousinery's Case* with approval, as I have done in one case; but I take leave to think that in the one instance, as in the other, the approval was of the general doctrine that the circuit courts must follow *Westray v. U. S.*, and require protest and appeal even when the United States are plaintiffs, however they may be dissatisfied with it. I think so because the chief justice took pains to show that there had been no effectual appeal in *Watt v. U. S.*; pains which were wasted if there could be no defense under any circumstances.

It cannot be the law that the only persons who have no judicial remedy are those who are the most injured by having a fresh demand

made upon them after they have paid all that was supposed to be due, and have received their goods.

In the case now before me the United States sue to recover duties upon four importations of what they call steel in bars, which was entered and duties paid as upon "scrap-steel," and the goods were delivered before the final liquidation, and the precise case of *U. S. v. Cousinery* is presented. I have given some reasons for saying that they may defend this action. I will add a secondary, though sufficient, reason. The statute (section 2931) upon which the *Cousinery Case* rests declares the decision of the secretary conclusive, unless the importer shall bring action within 90 days after payment, and these defendants have not paid, and, of course, the 90 days have not begun to run; and equally, of course, the secretary's decision is not final. Therefore, if the United States recover judgment and collect the money, the defendants could recover it back at any time within 90 days thereafter if the facts make the assessment illegal, unless they can now set up the same facts; which, of course, they can do to avoid circuitry of action. The only possible ground for not permitting them to recover in such supposed action is that they can and must make their defense here and now.

Upon the facts it is certain, and is not now seriously denied, that the goods imported were scrap-steel, and that the United States cannot recover the higher rate of duty.

It appears, however, that through some mistake of weights in the invoices, and without fraud, a small sum is due on the defendants' own classification. Neither the liquidations nor the declaration in the action informed the defendants of this, and it was agreed that an amendment should be filed, but that costs should not follow the judgment unless I thought fit to award them, which I do not.

The United States will have 20 days to except to my ruling upon the points of law involved in the case, after which there will be judgment for the plaintiffs for \$116.50 only.

SCHLESINGER and others v. BEARD.\* (No. 1546.)

UNITED STATES v. SCHLESINGER and others.\* (No. 1548.)

(Circuit Court, D. Massachusetts. December 29, 1882.)

**DUTIES ON IMPORTS—WROUGHT SCRAP-IRON.**

The punchings and clippings of wrought-iron boiler-plates and wrought sheet-iron, left after the manufacture of the boiler-plates into boilers, though it is waste iron, fit only to be manufactured, cannot be deemed scrap-iron for dutiable purposes, because it has not been in actual use.

*George P. Sanger*, U. S. Atty., for the United States.

*L. S. Dabney* and *W. S. Hall*, for Schlesinger and others.

LOWELL, C. J. These cases are submitted on agreed facts, which require me to decide whether the punchings and clippings of wrought-iron boiler-plates and wrought sheet-iron, left after the manufacture of the boiler-plates into boilers was completed, is dutiable at eight dollars a ton as wrought scrap-iron. If so, the importers are right; if not, the duty charged by the collector is rightly charged. The statute is Rev. St. § 2504, Schedule E, p. 466: "Wrought scrap-iron of every description, eight dollars per ton. But nothing shall be deemed scrap-iron except waste or refuse iron that has been in actual use, and is fit only to be remanufactured."

It is agreed that this is waste iron, fit only to be remanufactured. The only question is whether it has been in actual use. I do not find any recognized meaning of the words "actual use" which can be fairly applied to this new scrap-iron. The plates from which it was punched or clipped were new, and had been in no actual use, and I cannot discover any use to which the clippings have been put, any more than I can any to which they may be put hereafter until they they are remanufactured.

The statute seems irrational and harsh, but plain. The subject is thoroughly considered, and the various statutes, down to the Revised Statutes, are compared by Judge DEVENS in his opinion on one of these cases, in 16 Op. Atty. Gen. 445, with which I concur. The orders will be:

In No. 1546, judgment for the defendants for costs.

In No. 1548, judgment for the plaintiffs for \$1,611.92, and interest and costs.

\*Reversed. See 7 Sup. Ct. Rep. 543.

## UNITED STATES v. LOEB and others.

*(Circuit Court, S. D. New York.)*

## DISTILLER'S BOND—JUDGMENT ON.

In an action on a distiller's bond, a verdict was rendered for the full amount of the bond, subject to the opinion of the court upon the question whether the sureties were entitled to a deduction from the verdict of the amount realized from the sale of the distiller's personal property. *Held*, on a motion for judgment on the verdict, that the judgment should be entered for the full amount of the bond, the sum realized from the personal property not being a legal off-set.

*Mr. Hill*, Asst. Dist. Atty., for the United States.

*Mr. Ellis*, for defendant Conklin.

COXE, D. J. This is an action on a leaseholder's (distiller's) bond. On the trial a verdict was rendered for the full amount of the bond and interest, subject to opinion of the court. The plaintiff now moves for judgment on the verdict. The defendant Conklin, one of the sureties, insists that there should be deducted from the verdict the amount realized from the sale of the distiller's personal property, which was forfeited for various violations of the statute, and sold according to law. This position cannot be successfully maintained. It was the evident intention of congress that in cases of fraud, not only the personal property but the real estate should be forfeited. The bond in this case was given pursuant to section 3262 of the Revised Statutes, as a substitute for the real estate; the distiller holding simply a leasehold interest therein. The act provides, in substance, that if the distiller is not the owner of the fee, he must obtain the consent of the owner and incumbrancers to the effect "that in case of the forfeiture of the distillery premises, or of any part thereof, the title of the same shall vest in the United States." In lieu of this consent the distiller may give a bond—the bond in this case—conditioned "that in case the distillery, distilling apparatus, or any part thereof, shall by final judgment be forfeited for the violation of any of the provisions of law, the obligors shall pay the amount stated in said bond."

In order to establish the liability of the obligors, proof is necessary that the distillery, distilling apparatus, or some part thereof, has, by final judgment, been forfeited. This proof was produced on the trial, Nothing further was required. The bond is not intended as security simply; it is enforced as a penalty—as a punishment for fraud. *U. S. v. Distillery at Spring Valley*, 11 Blatchf. 255. If the position of

defendant is a correct one, no action at all could be maintained if the sale of the personalty aggregated the penal sum of the bond. The obligors bound themselves to pay to the United States the sum of \$16,000, in case the distillery, etc., described in the bond, should, by final judgment, be forfeited for the violation of law. The distillery was so forfeited, and the obligors are now called upon to make good their covenant. The law is undoubtedly harsh, but defendants entered into this obligation with full knowledge of its provisions, and have now no reason to complain.

The motion for judgment is granted.

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HUBBARD v. THOMPSON.\*

(Circuit Court, E. D. Missouri. December 14, 1882.)

**COPYRIGHT—INFRINGEMENT—PRELIMINARY INJUNCTION—ACCOUNT.**

Where a bill for the infringement of a copyright stated that the copyright claimed to have been infringed had been assigned to the complainant by the defendant, and charged the defendant with having infringed said copyright by the publication of a book therein described, and in the prayer asked for a preliminary injunction, an accounting, etc., and where affidavits were filed against the injunction, which tended to prove that the contract which complainant claimed had operated as an assignment of said copyright had not been intended to so operate; that the agreements therein, to be performed by complainant, had not been performed by him; that said contract had been abrogated before the book complained of had been published; and that the publication of said book had not infringed said copyright,—*held*, that an injunction *simpliciter* should be refused, but that defendant should be required to give a bond to answer to any damages that might be adjudged against him in the case, and that he should be required to preserve an account of all the copies of said book which he had disposed of, and keep an account of all of said books which he might thereafter dispose of.

In Equity. Motion for a provisional injunction.

The bill in this case charges the defendant with having infringed the copyright of a book entitled the "Illustrated Stock-Doctor and Live-Stock Encyclopedia," alleged to have been assigned by him to the complainant. The alleged infringement consists in the publication by defendant of a book entitled "The American Farmers' Pictorial Cyclopedia of Live-Stock." The prayer of the bill asks for an accounting and damages, and that defendant be first preliminarily

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

and subsequently permanently enjoined from publishing and selling, or offering for sale, any copy or copies of the infringing publication. Numerous affidavits were filed for and against the preliminary injunction. Those against the injunction tended to prove that the copyright of the "Illustrated Stock-Doctor and Live-Stock Encyclopedia" had not been assigned as alleged, to complainant; that the contract alleged to have operated as an assignment contained agreements to be performed by complainant which he had failed to perform; that said contract had been abrogated before the publication of "The American Farmers' Pictorial Cyclopedias;" that this latter work was an original compilation, and that its publication had not infringed the copyright on the "Illustrated Stock-Doctor and Live-Stock Encyclopedia."

*Josiah R. Sypher and S. M. Breckinridge*, for complainant.

*John B. Henderson and Kerr, Gibson & Kerr*, for defendant.

TREAT, D. J. It is not advisable, in passing on this motion, to elaborate the views of the court; for the case must go to final hearing on the merits.

It must suffice to say that the relationship of the parties to the controversy is complicated by the alleged contract between them, and its alleged abrogation. Whether the original contract and its alleged abrogation covered the *copyright*, is yet to be determined; also the question of non-performance of covenants. It may be that defendant's compilation is substantially a reproduction, within the rules of law, of plaintiff's publication, or it may be otherwise; yet upon this motion, under the doubts existing, the rule in equity requires, and it is so ordered, that instead of an injunction *simpliciter*, that the defendant give a bond in the sum of \$5,000, with John P. Hilfenstein as surety, to answer to any damages that may be adjudicated against him in this case; and that he keep an account of all the books by him hereafter sold or otherwise disposed of, and preserve an account of those heretofore sold and disposed of, which the plaintiff alleges are covered by the terms of the contract between them and the supposed assignment of the copyright in the bill mentioned; that is, of "The American Farmers' Pictorial Cyclopedias of Live-Stock," etc., published by the defendant.

WESTERN ELECTRIC MANUF'G CO. v. CHICAGO ELECTRIC MANUF'G CO.

(Circuit Court, N. D. Illinois. December 26, 1882.)

1. PATENTS FOR INVENTIONS—PATENTABLE INVENTION.

Where the proof shows that complainant's devices have been generally adopted, the fact that simultaneously a number of inventors had given their attention to the subject-matter covered by the devices, is evidence that something more was required than mere mechanical skill to accomplish the result obtained by complainant's patent.

2. SAME—COMBINATION—NEW RESULT.

Where the result produced by an aggregation of parts is the transmission of signals to a car when in motion, which had never been produced before the combination was adopted, and some of the parts in the combination performed a new function, the whole combination produces a new result.

3. SAME—INFRINGEMENT—DECREE.

Where there is no controversy on the question of infringement, complainant will be entitled to a decree and an accounting.

In Equity.

G. P. Barton and J. M. Thacher, for complainant.

Merriam & Whipple, for defendant.

BLODGETT, D. J. This is a bill to enjoin infringement by defendant of patent No. 172,993, issued February 1, 1876, to Elisha Gray, (application for which was filed February 3, 1873,) for "an improvement in electric annunciators for elevators" and patent No. 148,474, issued March 10, 1874, to Augustus Hahl, (application for which was filed February 7, 1872,) for an "improvement in electric indicators for elevators;" both of which patents complainant claims to own, by assignment from the patentees, and no contest is made as to complainant's title.

Defendant denies the validity of these patents:

(1) For want of novelty.

(2) That the Gray patent was irregularly issued on an interference declared between the application of Gray and the patent of Hahl after the Hahl patent had been issued.

(3) That both patents, but especially that of Gray, are void for want of certainty in the description of the thing claimed to be invented.

(4) That each of said patents only shows an aggregation of parts which, in the combination, perform no new results.

The Gray patent showed two methods of connecting the annunciators in the elevator cab with the signal keys on the several floors and with the battery: one by means of a flexible cable of insulated wires, which was attached to the car with sufficient slack to allow the car to

pass up and down the elevator well,—this is called the *flexible cable method*; and the other by means of wires suspended upon or against the side or wall of the well, and with which wires projecting from the the car and connected with the annunciator were kept in contact as the car passed up and down the elevator well,—this latter is called the *sliding or friction contact method*; and the proof without dispute shows that Gray first conceived the idea of this device in the latter part of 1870, and between that time and March 1, 1871, he constructed and put in operation an electric annunciator in the elevator in the Palmer House in this city upon the sliding or friction contact method. The Hahl patent also shows two methods of connecting the annunciators in the car with the signal keys and battery,—one by the flexible cable and the other by a friction contact device,—although the minor details of each are somewhat different from that of Gray's.

While the Hahl application was pending in the patent-office, interferences were declared between his device and pending applications for, substantially, the same thing by Edwin Holmes and James H. Corey, which resulted in a decision by the commissioner in favor of Hahl as the first inventor as against both Holmes and Corey, and the patent was issued to Hahl, dated March 10, 1874. After the patent had been issued to Hahl an interference was declared between the applications of Gray which had been filed in February, 1873, and Hahl, and pending this interference, after proofs had been taken, concessions were made between Gray and Hahl by which Hahl admitted Gray to be the prior and first inventor of the device contained and claimed in the first claim of the Gray patent, and Gray conceded to Hahl priority of invention of the flexible-cable method of connecting the annunciator in the car with the signal keys and battery; the proof showing that although Gray may have conceived the idea of the flexible-cable method prior to Hahl, yet Hahl was the first to embody that idea in a working mechanism, as well as the first to apply for a patent thereon.

After these concessions, the Gray patent was issued with only one claim, as follows:

“The combination of a movable elevator car, an annunciator attached thereto and moving therewith, circuit closing or breaking signal keys on different floors, respectively, of a building, and mechanism whereby an electric current is maintained between the signal keys and the annunciator without interruption by the movement of the car.”

Since the commencement of this suit, the complainant, as owner of the Hahl patent, has disclaimed so much of the Hahl patent as



claimed the sliding contact or friction method. These concessions and disclaimer left the Gray patent, covering only the general principle of connecting the annunciator in the moving car of an elevator with signal keys on the respective floors of the building and the battery by the means shown, but conceded priority of the flexible-cable method to Hahl.

The defense of want of novelty rests mainly on the patents of Holmes and Corey for similar devices, and the analogous devices of Foster, and the gas-tube by which gas is carried by means of a flexible tube to burners in an elevator car.

As to the Holmes and Corey patents it is sufficient to say that they were put in interference with the Hahl patent before the patent-office, and the commissioner, on proof, decided that the invention of Hahl was prior to that of either Holmes or Corey. This decision of the commissioner may not be so wholly conclusive upon all the world as to prevent the citation of the devices of Holmes and Corey as anticipating the Hahl patent, but no proof is introduced on this trial which was not before the commissioner on the interference, and it seems to me there can be no doubt that the decision of the commissioner was correct upon the testimony in the matter then before him, and that his award of priority to Hahl sufficiently disposes of the Holmes and Corey devices for the purposes of this case.

The Foster patents are for devices for transmitting signals by means of pneumatic tubes. Neither of them shows the application of the device to an annunciator in the car of an elevator while in motion; and even if they had shown such application of the Foster devices, I do not think a person could, without invention, from any hint or suggestion in the Foster devices, by mere mechanical skill adapt the system of electric calls used in Hahl's device to an elevator car. The same may be said of the flexible gas-pipe. Neither air working through a flexible pneumatic tube, nor gas passing through it for the purposes of illumination, are the electric fluid, and it required something more than was done either by Foster with his pneumatic tube, or whoever applied the gas-tube, to apply electricity to the operation of an annunciator in a car in motion. The proof shows that since the Hahl and Gray patents this device has been generally adopted for use in elevator cars, and its adoption, and the fact that almost simultaneously quite a number of inventors—two of them, at least, Gray and Holmes, well known to the public for valuable inventions in the field of electrical science—had given their attention to the subject-matter covered by the devices now before us, is evidence that it

required something more than mere mechanical skill to accomplish the result attained by this patent.

As to the second point, that this device shows only a mere aggregation of parts and produces no new result, it is sufficient to say the result produced is the transmission of signals to a car *when in motion*, which was new and had never been produced until this combination, and that some of the parts in this combination perform a new function, and the whole combination produces a new result.

As to the objection that the Gray patent was irregularly issued, it is, perhaps, not material to the purposes of this case to consider that point seriously, because the defendant in this case is shown by the proof to only use the flexible-cable method covered by the Hahl patent; but I have no doubt that under section 4904 of the Revised Statutes the commissioner of patents had the right to declare an interference between Gray's application and the Hahl patent, as the statute expressly gives him the power to declare an interference between "any pending application and any unexpired patent." So, too, it seems to me that both patents are sufficiently definite in their statements to describe and cover the inventions claimed.

There is no controversy in this case on the question of infringement. The proof shows that the defendants have used, and are using, the flexible-cable method shown and described in the Hahl patent. I can, therefore, see no reason why the complainant is not entitled to a decree and an accounting.

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J. B. BREWSTER & Co. and others v. PARRY.

(Circuit Court, D. Massachusetts. December 19, 1882.)

PATENTS FOR INVENTIONS—REISSUE—PRELIMINARY INJUNCTION.

A motion for a preliminary injunction against an infringement of a reissued patent, where there is no doubt that the reissue is in terms broader than the original, but which change may be legitimate, as describing the real invention, will be denied.

In Equity.

L. Gifford and W. B. H. Dowse, for complainants.

J. A. Loring and W. P. Preble, Jr., for defendant.

LOWELL, C. J. This motion is for a preliminary injunction against an infringement by the defendant of the reissued patent No. 6,018,

for an improvement in carriage springs. This invention has for its object to improve the manner of connecting the bodies of light carriages with the side-bars, by which they are supported, and consists in interposing a pair of semi-elliptic springs between said side-bars and the wagon body. The single claim of the reissue is: "The semi-elliptic springs, G, G, interposed between the side-bars, F, F, and the wagon body, all combined substantially as specified."

The suit is brought by J. B. Brewster & Co., the owners of the patent, and James Hume, the exclusive licensee for Amesbury Mills, a territory in which a very large number of carriages are made.

Two defenses are insisted on—that J. B. Brewster & Co. have issued licenses to a great number of spring makers, to make and sell springs fit to be used in the patented combination, which imply a right to use or authorize the use of the springs in making carriages, and that the defendant bought his springs of a licensee; and that the reissue is void.

To the first defense the reply of the plaintiffs is that Hume's exclusive license to make and sell in Amesbury Mills is older than the licenses to the spring makers, and was well known to them and to the defendant; and to the second, that the reissue claims the true invention of Wood, the original patentee, and was taken out only 14 months after the patent was granted.

There can be no doubt that the reissue is, in terms, broader than the original, and that it includes and was intended to include one class, though not a large class, of carriages not covered by the original patent. The patent, No. 139,348, describes and claims an improvement of carriages having the ends of the side-bars supported by elliptic springs, by adding middle springs. The claim is: "A frame, consisting of the side-bars, F, F, downwardly-bowed end springs, E, E, and upwardly-bowed middle springs, G, G, constructed, arranged, and applied as and for the purpose described."

It is seen at once that the reissue omits the end springs, E, E, and thus covers wagons rigidly attached at the ends, which are not within the former claim. Under the law, as formerly understood, I should not doubt that this change is legitimate, as describing the real invention; but under late decisions of the supreme court I hesitate to decide so on a motion of this sort, especially because I am not able to say what limit of time that court intend to lay down within which a mistake of judgment may be corrected. True, it is as easy to decide such a question on motion as at a hearing, but the difference is that a wrong decision on a motion is not appealable, and, besides, it is

within the power of the court at a hearing (though not often exercised of late) to grant a decree for damages or profits and withhold the injunction. For these reasons, though my impressions are in favor of the plaintiffs, I must deny the motion.

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WARD v. GRAND DETOUR PLOW CO.

(Circuit Court, N. D. Illinois. January 8, 1883.)

1. PATENT FOR INVENTION—COLORABLE DIFFERENCES—INFRINGEMENT.

Where defendant's device, used in a combination of parts, is the same for all practicable purposes, and performs the same function, and no other, in the mechanism as the device of complainant, and the difference between the devices is merely colorable, it is an infringement of complainant's patent.

2. SAME—EVIDENCE OF NOVELTY AND UTILITY.

Where the proof shows that many others had endeavored unsuccessfully to accomplish what the complainant achieved, and also that the device of complainant was at once accepted by the public, the fact of success and acceptance by the public in a field where others had tried and failed, is sufficient evidence that the device was both new and useful.

In Equity.

*J. G. Manaham*, for complainant.

*West & Bond*, for defendant.

BLODGETT, D. J. This is a bill to enjoin the alleged infringement of a patent to Adam B. Spies, No. 153,225, dated July 21, 1874, for an "improved harrow," and for an accounting. Defendant denies the infringement, and denies the validity of the patent for want of novelty. Complainant claims by assignment from the patentee, and no question is made to his title. The Spies harrow is made by attaching two or more sections to a draw-bar, so that each section may rise independently of the other, or others, and so that each section may preserve its relative position to the other section or sections, without the use of other hinges or other connecting devices between the section. The sections are joined to the draw-bar by means of an eyebolt fastened through the draw-bar so as to leave the eye in a vertical position, and a clevis which passes through the eye of the eyebolt, and is attached horizontally or flatwise to the front end of one of the section beams, and each section is connected to the draw-bar by two such joints. This form of connection gives two vertical joints or points of articulation,—one at the clevis-bolt and one at the connection between the clevis and eyebolt,—but only gives one joint

or point of movement laterally, which is at the connection of the clevis and eye, and is necessarily quite limited. The advantages claimed for this mode of connecting the sections to the draw-bar are—

(1) In turning around it is impossible for one section to get over or under another, as all the sections are kept in line of the draw-bar, from the fact that they are attached to the draw-bar at two points, and they are allowed so slight a lateral motion that they cannot interfere with, or override each other; (2) the clevises have sufficient play at the eyebolt joint to allow an undulating or tilting motion of the sections, which enables them to adjust themselves to the inequalities of the ground; (3) the two vertical joints make it easy to raise the sections freely to such height as may be required to clear them from accumulated rubbish, and also permits the sections to readily adjust themselves to the surface of the ground over which they pass.

The patentee says:

"I make no claim to the harrow generally, as to the shape or number of the sections or the structure of the sections, nor do I claim the draw-bar, for I am aware that these are not new; but I claim as my invention the eyebolts, A, A, A, A, and the clevises e, e, e, e, in combination, one pair of each to each section of the harrow, and in combination with the section and draw-bar, substantially in the manner and for the purpose specified."

The defendant uses the clevis in precisely the position and relation to the other parts of the mechanism as is shown in the complainant's patent, but instead of an eyebolt and shank, which passes through the draw-bar, defendant uses an eye fastened to the draw-bar by a bifurcated clip, which clasps the draw-bar on each side, and the legs of which are secured to the draw-bar by bolts or rivets. The eye is set vertically, and the only difference in fact between the defendant's joint or coupling, by which his sections are attached to the draw-bar, and the complainant's, is that the defendant's eyebolt has this split shank instead of the straight bolt passing through the draw-bar, as shown by complainant. Defendant's joint is the same for all practical purposes and performs the same functions and no other, in the mechanism as the Spies joint. The difference is merely colorable and clearly infringes the patent.

Upon the question of novelty, defendants have put in evidence—

"(1) Patent of J. H. Eldward, issued November 17, 1868, for a sectional harrow; (2) patent to Andrew Nuquist, issued July 27, 1869, for a harrow with zig-zag sections; (3) patent to N. McCuen, dated February 25, 1862, for a harrow in sections; (4) patent to J. E. Van Riper, dated August 6, 1867, for a sectional harrow."

In all these harrows the sections are shown to be connected to the draw-bar by joints or links, but none of them show the flat joint peculiar to Spies' device.

Defendants have also shown by the proof the use of two harrows not patented prior to the invention of Spies,—one made as early as 1862, by John A. Jacobs, of Whiteside county, Illinois,—in which the sections were loosely jointed to the *draw-bar*, but the joints were different in their formation and operation from the Spies' joint in this: the joint was formed by a bolt passing through the draw-bar, the rear of which was split or bifurcated so as to clasp or embrace the forward end of one of the section beams flatwise, or horizontally, and attached to the beam by a bolt passing horizontally through these legs and the beam. This gave the clevis pin-joint of the Spies device, but did not give the eyebolt and clevis-joint of Spies' patent, and therefore did not allow of the tilting motion which is obtained by the Spies connection.

The other was made and used by Mr. J. A. Patterson, of Rock Falls, Whiteside county, Illinois, as early as 1870, in which the sections were attached to the draw-bar by hooks and eyes, forming a joint similar in its operations and characteristics to the joint in the Jacob's harrow, only allowing motion in one direction, and one point of articulation.

The differences between these couplings, shown in the Spies device, and those shown in the older art, are not in one sense very wide, but the peculiar adaptation of the Spies coupling, to secure just the result needed for a successful harrow, is abundantly shown by the proof, and undoubtedly makes the point, and perhaps the only point, in which he improved on what others had done before him. The proof, however, shows not only that many others had endeavored unsuccessfully to accomplish what he achieved, but also that his device was at once accepted by the public; and the fact of success, and acceptance by the public, in a field where so many others had tried and failed, is sufficient evidence that his device was both new and useful, and the result of inventive genius.

The defendants insist that their harrow is like the harrows of those who preceded Spies in the art. The answer to this is simply that it is like prior inventions in all particulars except the Spies double joint, and they have taken the Spies double joint bodily and appropriated it to their use by a mere colorable change, which leaves the joint intact to perform the function which Spies intended it should perform. Spies' patent, and the records of the patent-office also, show that Spies fully comprehended the point of difference between his invention and that of those who had preceded him, and that he claimed as the special merit of his device the mode of attaching his sections to the draw-beam, 1, by these flat or horizontal double joints; and the opin-

ion of the commissioner in chief of the patent-office, which is in evidence in the case, shows that after the rejection of Spies' application for a patent by the primary examiner, his patent and claim was allowed, on appeal to the principal examiner, upon the specific ground that he had accomplished by his double joint what the state of the art showed no inventor who had preceded him had done. It is true, this decision of the examiner as to the patentability of the device is not conclusive upon this court, but I think it deserving of mention that the distinguishing merit of Spies' harrow was understood by himself and appreciated by the patent-office, and is not the *ex post facto* discovery of an expert or solicitor after the issue of the patent.

The complainant is entitled to a decree finding the patent valid, and that defendant has infringed the same.

## SUN MUTUAL INS. Co. and others v. MISSISSIPPI VALLEY TRANSP. Co.\*

(District Court, E. D. Missouri. December 13, 1882.)

### 1. PLEADING—CORPORATIONS.

Where parties joined as libelants are corporations the libel should so aver.

### 2. SAME—JOINDER OF PARTIES.

Where goods belonging to different parties are shipped by the same vessel, and are injured by a common disaster caused by the same act of negligence on the carrier's part, the different shippers or their assignees may join in filing a libel in admiralty to recover their damages.

### 3. SAME.

In such cases the demand of each libelant should, it seems, be alleged in a distinct article.

### 4. SAME—PLEADING—EXHIBITS.

Where the cause of action set forth in a libel has arisen from the violation of a written contract of a freightment, the libel should so state, and the contract should be annexed to the libel, or a legal excuse for its absence given.

### 5. COMMON CARRIER—NEGLIGENCE—COLLISION CAUSED BY CARELESSNESS OF PARTIES FURNISHING MOTIVE POWER.

Where A., a common carrier, which owned a line of barges, contracted with B. to convey certain goods on its barges safely from C. to D., the dangers of navigation and collision excepted; and where, while A. was getting together its barges in the harbor of C., preparatory to starting them to D., the barge in which B.'s goods had been placed was brought into collision with another of A.'s barges, through the mutual carelessness of two tug-boats belonging to E., but which were in A.'s employ, and at the time engaged in towing said barges, and B.'s said goods were damaged,—*held*, that the collision was not an excepted peril, and that A. was liable to B. for the damages which he had sustained.

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

## 6. SAME—LIMITATIONS.

Suit having been brought against said carrier, upon the cause of action above stated, about 28 months after the collision, *held* that the demand had not become stale.

In Admiralty. Suit for damages.

The libelants alleged in their original libel that they were insurance companies; that respondent was a common carrier, and the owner of a barge line running between St. Louis and New Orleans; that several different lots of merchandise (describing them) insured by libelants had been delivered to respondent, "for the respondent, as common carrier, to receive, take care of, and to safely and securely carry and convey from said city of St. Louis to the said city of New Orleans without delay, the dangers of navigation, explosion, and collision only excepted, and there, at the said city of New Orleans, to deliver all the said goods, in like condition and good order, \* \* \* for certain reward to be paid therefor; and that respondent had, as such common carrier, accepted said merchandise for transportation as aforesaid;" that said goods were laden on defendant's barge, New Orleans, which was moored along-side of a warehouse in East St. Louis; that respondent was the owner of another vessel known as barge Fifty-four, upon which respondents had laden a cargo, and which they had moored along-side of an elevator at the city of St. Louis; that defendants, intending to use one of their tow-boats to tow these barges to New Orleans, hired two steam-tugs to tow the barges from the places at which they were respectively moored to a point in the harbor of St. Louis at which their wharf-boat and tow-boat were lying; that, in pursuance of that hiring, respondents ordered one of said tugs to go for one of said barges, and the other to go for the other, and tow them to their said wharf; that each of said boats made fast to the barge for which it had been sent, and started for respondent's wharf; but before reaching it the two barges were brought into collision with each other through the mutual carelessness of the crews of said tug-boats, and the merchandise shipped as aforesaid greatly damaged; that libelants respectively paid the consignors of the merchandise insured by them the amount of their losses; and that said consignors assigned their respective causes of action arising as aforesaid to libelants.

The demands of the libelants were all alleged in the same article. It was not stated whether the contracts of affreightment were written or oral, (though they were in fact written,) and they were not set out in or attached to the libel; nor was it stated in the libel whether



or not libelants were corporations. The collision was alleged to have occurred February 1, 1880. The libel was filed July 22, 1882.

The respondent excepted to the libel on the following grounds, to-wit: (1) That libelants had delayed the production of suit for the enforcement of their pretended demands until the same were stale; (2) that the libel was multifarious; (3) that it did not state any cause of action, inasmuch as it was alleged that it was based upon a cause of contract of affreightment, and said libel did not state with legal certainty sufficient facts to show what such contract was, and did not state facts sufficient in law to show that respondent ever made a contract of affreightment with libelants, or that they have any cause of action upon any contract of affreightment against respondents; that said libel did not state facts authorizing libelants to sue upon any contract of affreightment, nor facts showing any breach of contract of affreightment upon which it is liable to libelants; that said libel mingles in an inextricable manner in one statement, several distinct alleged and pretended causes of action, (not describing either with legal certainty,) which cannot be so united and pleaded; that said libel was not drawn with sufficient certainty and precision to enable the respondent to answer same with safety; and that it is vague and indefinite, and violative of the rules of admiralty pleading requiring particularity and certainty.

*O. B. Sansum and Brown & Young*, for libelants.

*Given Campbell*, for respondent.

TREAT, D. J. 1. It appears from the verification that each of the libelants is a corporation; and, if so, the libel should so aver.

2. If the contracts of affreightment were in writing the libel should so state, and annex the same, or give a legal excuse for not so doing. According to the libel there was a common disaster, whereby the injury was done to the property named, belonging to different owners, to whose rights, respectively, these libelants separately succeed. Their right to join in the action is within the reason of the rule laid down in collision, and other cases, to prevent multiplicity of suits resting on a common ground. If it be found true, as averred, that the same act of negligence caused the injury to each, nothing will remain other than to ascertain the extent of damages sustained by each owner, and to enter a decree accordingly. In other than admiralty proceedings such joinder would be inadmissible.

Rule 23 in admiralty states the general mode of pleading, under which there may be some doubt whether the interest or demand of each libelant should not be alleged in a distinct article, so that the

respondent may answer thereto as the facts justify, for it may be very different defenses exist.

The exceptions will be sustained as to the three points here stated, and leave granted to amend accordingly.

The exceptions as to all other points are overruled.

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An amended libel was thereupon filed, to which were attached as exhibits bills of lading for the goods alleged in the libel to have been damaged. The bills of lading each contracted to deliver the merchandise described therein without delay at New Orleans, "*the dangers of navigation, fire, explosion, and collision excepted.*"

TREAT, D. J. The libelant, subrogated to the rights of several shippers and consignees, claims, under respective contracts of affreightment, that the respondent is answerable for the non-delivery of the goods shipped. The bills of lading contain the excepted perils as to the dangers of navigation, etc.

The facts are, briefly, that many goods were shipped on respondent's barges in the port of St. Louis, one of the barges being on the Missouri shore and the other on the Illinois shore and above the bridge. The respondent had its barges at different points in the port for the purpose of being loaded, and when so loaded employed harbor tug-boats to tow them to respondent's wharf-boat, where the general tow was made up for the purpose of transporting or towing the fleet of barges down the Mississippi river to their destination. In the course of respondent's business two tugs were sent by it above the bridge,—one to the Illinois shore and one to the Missouri shore,—each to tow respectively a specified barge to respondent's wharf-boat. It so happened that the respective tug-boats, in the attempted performance of their duties, collided, whereby the damages complained of were caused. The contention has been, and a large amount of evidence taken, that the tugs were not in fault, but the accident was inevitable, or a peril of navigation; or, if that be not so, that the tug-boats, one or the other, or possibly both, were in fault, and they or their owners are alone liable for the damages.

From the evidence, both were in fault; but whether this is so or not is unimportant in this case, for each belonged to the same owners, and this is not a suit *in rem* against either, nor is it a suit *in personam* against the owners of the tugs.

The sole question is whether, under the contracts of affreightments, such employment of the tug-boats, and a disaster caused by the misconduct of one or the other, exonerates the respondent from his liability, and drives the shippers to a suit against the tug-boats and their owners.

Under the affreightment contracts the goods shipped were to be delivered safely at New Orleans, with the excepted perils reserved. The shippers were not concerned with nor to be affected by the motive force to be employed by the respondent. The latter had a legal right to use one or another tow-boat for its purposes at any stage of the voyage. When the cargo was delivered on the specified barge, and the bill of lading received therefor, the duties of transportation were assumed by the respondent. The latter's mode of gathering together several barges from different places, to make up a general tow or fleet for its own convenience, was no part of its contract with the shippers—they may have been residents of far-distant places forwarding their goods to St. Louis for transportation to New Orleans. Once delivered under proper bills of lading to respondent, they had a legal right to rely on their contracts, irrespective of contracts with other shippers, or with arrangements that respondent might make for its own convenience. Whatever respondent did, after receipts under its bill of lading, it did at its own costs and for its own purposes. It might employ one or more tug-boats or tow-boats, as it deemed best; but it could not thereby escape the obligation of its contracts with the shippers, nor remit them to the sole responsibility of such tug-boats.

This is not a case of collision where a third party pursues the wrong-doer, nor where a tug-boat seeks to escape the consequence of its own wrong. Whether an action would lie against the tug-boats employed by the respondents need not be discussed, for the sole question here pertains to the original and continued liability of the respondent, despite the agencies it employed.

The evidence concerning the duties of harbor tugs with respect to tow-lines and lookouts, or of respondent's duties with respect thereto, cannot affect the question under consideration. It was the duty of respondent to do, or cause to be done, whatever was needed for the safe transportation of the shippers' property; hence, no act of negligence by the harbor tug will, as against the shippers, excuse the respondent. It may or it may not be that the respondent has a cause of action against the harbor tugs for the injury done the shippers, and might have maintained a suit therefor, originally, for such

injury to said shippers, and to its own barges. The special question is, when, according to the necessities or custom of a port, an injury is caused by a tug employed by a vessel, is the tug to be visited solely with the loss, and the vessel towed to be exonerated, irrespective of the bill of lading; or whether the vessel on which the goods are shipped is liable to the shippers, leaving it to its redress against the tug? It may be that the shippers had a cause of action against the tug, and that the respondent could have maintained such an action for itself and the shippers; yet the question recurs whether, under the contracts of affreightment, the respondent is not liable for injuries caused through the misconduct of its own agents. Nothing except a peril of navigation, etc., would excuse the respondent. If a collision is such a peril, when the fault is solely of another colliding vessel, can the faults or negligences of tugs employed by the respondent under the circumstances stated be considered as perils external to itself, which it could not and ought not to control? In other words, ought not the action of the tugs to be considered the action of the respondent, just as positively as if the loss had occurred after the fleet had been made up and was proceeding on its way with respondent's tow-boats in charge, through whose fault the loss occurred? Under the latter supposition, the negligence of respondent's tow-boat would work no excuse; and so if one or more harbor tugs were used by it, and through the negligence of one or the other, or both, the vessel bound by the contract of affreightment failed to fulfill the same, the loss is one for which it is responsible.

The many cases cited refer to injuries where third parties suffer from collisions, vessels being in tow of harbor tugs. The case under consideration is clearly distinguishable in principle, for here the shipper sues on his contract of affreightment, and the respondent can be discharged from its obligation only by proof of an excepted peril. Instead of proving a loss by an excepted peril, the evidence shows a loss through the negligence of its own agents—one or both of the tug-boats.

The court holds that the respondent is liable, and decrees accordingly, and orders that the case be referred to William Morgan to report the amount of the loss sustained under the contracts of affreightment.

## HARDIN v. OLSON.

(Circuit Court, D. Minnesota. December Term, 1882.)

## 1. REMOVAL OF CAUSE.

A cause is not removable from a state to a federal court, if it could not have been originally instituted in the federal court by the plaintiff as assignee of the instrument sued on.

## 2. NEGOTIABLE INSTRUMENT—UNCERTAINTY IN.

Where the instrument is uncertain as to amount and time of payment of attorney's fees to be paid in case of suit brought on the note, and uncertain as to the person to whom payable, and dependent on the contingency of the bringing of suit thereon, it is not a negotiable instrument under the laws of Minnesota.

## On Motion to Remand.

Suit instituted in the United States court by plaintiff as assignee of the instrument sued on, which was in the form of a negotiable promissory note, except that it contained an agreement by the maker to pay 10 per cent. of the principal as attorney's fees in case suit should be brought upon it. Cause removed to this court on the ground of the citizenship of the parties. Motion to remand on the ground that the instrument is not a promissory note, negotiable by the law-merchant, within the meaning of the first section of the act of congress of March 3, 1875, and therefore not an instrument on which the assignee can sue in this court without showing that the suit might have been maintained here by the assignor.

*James Quirk and John M. Gilman*, for plaintiff.

*Collister Bros. and Lewis & Leslie*, for defendant.

MCCRARY, C. J. The note sued on was executed and made payable in the state of Minnesota, and is therefore to be interpreted according to the laws of that state; and in determining the question as to whether it is to be regarded as a promissory note, negotiable by the law-merchant, within the meaning of the act of congress of March 3, 1875, it is proper to inquire what is the law of the state upon the subject, as determined by its supreme court.

It has been held that a state statute, defining the requisites of a negotiable promissory note, will be followed by a federal court sitting in that state in construing a contract made and to be performed therein. *Green v. Weston*, 7 Biss. 360. The same rule should, we think, obtain where the law of the state has been declared by the adjudication of its highest judicial tribunal. The parties are pre-

sumed to have contracted with reference to the law of the state in which their contract was made and to be performed, whether that law has been settled by legislative enactment or by judicial decision.

The question, therefore, is whether the instrument sued on is a negotiable promissory note according to the law of Minnesota. It is not claimed that there is any statute upon the subject, but it is insisted that the question has been decided by the supreme court of the state in the case of *Jones v. Radatz*, 27 Minn. 240; [S. C. 6 N. W. Rep. 800.] That was a suit upon a promissory note in the usual form, except that it provided for payment by the maker of "reasonable attorney's fees if suit should be instituted for its collection." It was held not to be a negotiable promissory note, the court saying:

"Stipulations collateral to the obligation, such as relating to security, or to the remedy to enforce the obligation, have been held not to affect the negotiable character of the instrument. But we know of no case which concedes that the fixed character of the obligation may be changed, either by making it uncertain as to amount or time of payment, or person by whom or to whom payable, or by making it depend to any extent on a contingency without depriving the instrument of the negotiability. Certainty in these respects is essential to negotiability."

It is manifest that the instrument sued on in the present case is not a negotiable promissory note within the rule laid down in this decision. The instrument is uncertain as to amount, for the 10 per cent. attorney's fees is only to be paid in case suit is brought upon it; it is, as to the attorney's fees, uncertain as to time of payment, for such fees are only to be paid after suit, which may be brought at any time within the statute of limitations. It is uncertain as to the person to whom payable, because we must presume that payment of attorney's fees is to be made to whomsoever as attorney shall bring suit; and it is uncertain, because it depends upon a contingency, to-wit, the bringing of a suit. It has, it is true, one element of certainty not found in the instrument passed upon by the supreme court of Minnesota: the amount to be paid as attorneys fees is fixed in the present case, while it was left indefinite in that case. But all the other elements of uncertainty remain, and they are sufficient, according to the law as declared by the supreme court of this state, to deprive the instrument of its negotiability. Without, therefore, determining what construction should be given to the instrument sued on, in the absence of any settled rule having the force of law within the state where the contract is made and to be performed, and without reviewing the conflicting authorities upon that question, we think

it proper, in the present case, to follow the decision of the supreme court of Minnesota, and to hold the instrument non-negotiable.

Following the rule laid down in *Berger v. County Com'rs*, 2 McCrary, 483, [S. C. 5 FED. REP. 23,] we must also hold that the cause was not removable, because it could not have been originally instituted in this court by the plaintiff as assignee of the instrument sued on.

The motion to remand must be sustained. So ordered.

See note to *Merchants' Nat. Bank v. Sevier*, ante, 662, 667.

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POPPENHAUSER v. INDIA-RUBBER COMB Co. and others.

(Circuit Court, S. D. New York. January 4, 1883.)

1. CITIZENSHIP—CHANGE OF DOMICILE.

For the purposes of the jurisdiction of the court of the United States, domicile is the test of citizenship. A person may be a resident alien, but cannot be a citizen of the state when he has abandoned his domicile there.

2. SAME—CASE STATED.

The defendant having removed this suit from the state court, the plaintiff moves to remand upon the ground that she was at the time of the commencement of the action, and now is, a citizen of the state of New York, where the defendants reside. By the affidavit of the husband of the plaintiff in support of this motion, and another affidavit in the case, it appears that the plaintiff and her husband, a naturalized citizen of the United States, resided in the state of New York from 1859 to 1871; that in the latter year she removed with her husband to Hamburg, Germany, where she has since continuously resided, her husband having returned to this country occasionally on business. *Held*, that though by reason of her husband's naturalization the plaintiff might be entitled to all the privileges of citizenship here, the practical inference from the facts as they appear in the affidavits is that she has changed her residence, and that the plaintiff's position is no better than that of a native-born citizen who has changed his domicile. The suit was properly removed.

W. Z. Larned, for plaintiff.

Abbett & Fuller, for defendants.

WALLACE, C. J. The defendants having removed this suit from the state court, the plaintiff moves to remand upon the ground that she was at the time of the commencement of the action, and now is, a citizen of the state of New York, the state where the defendants reside. The affidavit upon which the motion is founded is made by Conrad Poppenhauser, the husband of the plaintiff, and states that he was a resident of the state of New York continuously from 1848

to 1871; that he was naturalized in 1848, and became, and has ever since been and now is, a citizen of the state and of the United States; that he and the plaintiff intermarried in 1859, and plaintiff came to this state with the deponent, and from that time resided with him continuously until 1871; that, although since 1871 he and the plaintiff have resided for the greater part of the time in Hamburg, Germany, he has frequently returned and spent considerable time here; that his future residence will depend much on the exigency of his business; and that neither he nor the plaintiff have in any way forfeited their rights as such citizens.

The plaintiff, by virtue of her husband's naturalization, may not be an alien, and may be entitled to all the privileges of citizenship, but the question is whether she was a resident of this state when the action was brought. Conceding that she was not an alien, if she was not a resident of the state the suit was properly removed. Her position is no better than that of a native-born citizen who may have changed his domicile. For the purposes of the jurisdiction of the courts of the United States, domicile is the test of citizenship. A person may be a resident alien, but cannot be a citizen of the state when he has abandoned his domicile there. *Case v. Clarke*, 5 Mason, 70; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Lanz v. Randall*, 4 Dill. 425.

Upon the moving affidavit of plaintiff's husband, the statement of facts is inconsistent with the legal inferences which are asserted. The facts that he left here in 1871 with his wife, and that she has never returned, although he has been here temporarily at times, are more indicative of an intention to abandon the domicile here than the occasional visits on his part are of retaining it. But among the papers in the record filed upon removal there is an affidavit of the plaintiff's husband, made for the purpose of obtaining an order in the course of proceedings in the state court, in which he distinctly states that both the plaintiff and himself reside at Hamburg, Germany. Of course the plaintiff's domicile is determined by that of her husband; but when it appears that for many years she has had a permanent abode at Hamburg, and he has lived there also, except when called away by the exigencies of business, the practical inference is that the place of her abode is also that of his domicile. It must be held that the plaintiff has failed to show that she was domiciled in this state when the action was commenced.

It is insisted that one Koenig, who is named as a defendant, is a citizen of Germany, and that there is not a divisible controversy between citizens of different states. The fact that Koenig has not



been served with process, and therefore is not a party to the suit, disposes of this question. He may never be brought in. If he should be, it would seem that there is a controversy which is divisible, and can be litigated by the other parties without his presence. It matters not that there is another controversy involved in the issues to which he may be an indispensable party. *Barney v. Latham*, 103 U. S. 205. Motion denied.

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## HURLBURT v. VAN WORMER.

(Circuit Court, N. D. New York. January 5, 1883.)

## 1. LETTERS TESTAMENTARY—CONCLUSIVE EVIDENCE UNTIL REVOKED.

By section 2591 of the New York Code of Civil Procedure, letters testamentary are declared conclusive evidence of the authority of the persons to whom they are granted, until revoked or the decree granting them is reversed upon appeal.

## 2. SAME—JURISDICTION—RECITALS OF FACTS NECESSARY TO CONFER.

The recitals of the jurisdictional facts necessary to confer jurisdiction, in the decrees of courts of exclusive though limited jurisdiction, are *prima facie* evidence of the facts recited. On this principle it has been repeatedly declared that the granting of letters testamentary is in general *prima facie* evidence of the death of the testator.

In Equity.

*Neri Pine*, for complainant.

*M. F. Brown*, for respondent.

WALLACE, C. J. The only ground upon which a decree for the complainant is opposed is that the complainant has failed to establish affirmatively the death of Rockwell, the testator of the complainant's assignor, the complainant having acquired title to the letters patent in suit by assignment from one Arnold. Letters testamentary were granted to Arnold by the surrogate of Broome county, in this state, reciting the death of Rockwell; that he was an inhabitant of Broome county at or immediately previous to his death; and that his will was duly admitted to probate by said surrogate. Such letters, by the Code of Civil Procedure of this state, § 2591, are conclusive evidence of the authority of the persons to whom they are granted until the letters are revoked, or the decree granting them is reversed upon appeal.

Irrespective of this statute, the recitals of the jurisdictional facts necessary to confer jurisdiction, in the decrees and judgments of courts of exclusive though of limited jurisdiction, are *prima facie* evi-

dence of the facts recited. Upon this principle, it has been repeatedly declared that the grant of letters testamentary is in general *prima facie* evidence of the death of the testator or intestate. *Comstock v. Crawford*, 3 Wall. 396; *Belden v. Meeker*, 47 N. Y. 307; *Welch v. N. Y. C. R. Co.* 53 N. Y. 610; *Thompson v. Donaldson*, 3 Esp. 63; *Jeffers v. Radcliff*, 10 N. H. 242. The facts elicited by the proof relative to Rockwell's disappearance are not sufficient to countervail the presumption thus established.

A decree pursuant to the prayer of the bill is directed.

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WHITE, WASHER & KING v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, D. Kansas. June Term, 1882.)

1. TELEGRAPH MESSAGES—NEGLIGENT TRANSMISSION—LIABILITY.

In an action for damages for negligence in the transmission of a message by a telegraph company, whereby the sender of the message suffered pecuniary loss, the burden of proof rests upon the plaintiff to show that the error or mistake occurred through the culpable carelessness and gross negligence of the operators or employes of the company; a simple mistake in transmitting a dispatch is not sufficient to render the company liable.

2. SAME—NATURAL CAUSES.

Where the errors or mistakes in the transmission of the dispatch occurred through climatic influences, such as storms, lightning, rain, or other natural causes, temporarily affecting the insulation of the wires, or the working of the instruments, the company is not responsible: as the mere fact that a mistake was made in the message transmitted would not itself authorize any recovery for more than nominal damages.

3. SAME—CONTRACT RESTRICTING LIABILITY.

A contract written at the head of a telegraph dispatch restricting the liability of the company for loss from mistake or negligence in the transmission or delivery of the dispatch, will not exonerate the company from loss or damage caused by the wanton carelessness or gross negligence of its servants, agents, or operators.

4. SAME—NEGLIGENCE.

The highest degree of care is not required of telegraph companies in the transmission of messages over its lines; if ordinary care is exercised by its agents, employes, or operators, it is sufficient to exonerate them from liability for loss or damage.

5. SAME—GROSS NEGLIGENCE.

Gross negligence is that want of care which a person habitually careless and negligent would exercise in business transactions.

This was an action to recover damages by reason of an alleged mistake in transmitting a dispatch over the lines of defendant's company. The dispatch was sent pursuant to certain regulations and conditions

as contained in the telegraph blank upon which the message was written. The original dispatch, together with the printed form upon which the same was written, is as follows, to-wit:

*"The Western Union Telegraph Company. All messages taken by this company subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delay arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: 1 per cent. for any distance not exceeding 1,000 miles, and 2 per cent. for any greater distance. No employe of the company is authorized to vary the foregoing. The company will not be liable for damages in any case where the claim is not presented in writing within 60 days after sending the message. 6-18-1879. Send the following message, subject to the above terms, which are agreed to: 'To McGinnity, Adams & Sherry, St. Louis: Sell fifteen July wheat; sell rye fifty-two or more.*

*'WHITE, WASHER & KING.'*

"Read the notice and agreement at the top."

The mistake in transmitting the dispatch was in substituting the words "fifty" July wheat for the words "fifteen" July wheat, as the message was originally written, and the plaintiff's brokers having sold 50,000 bushels of wheat for July delivery, a change in the market caused loss to the plaintiffs, who claimed damages by reason of the error in transmitting the dispatch.

*Tomlinson & Griffin and W. W. Guthrie, for plaintiffs.*

*Everest & Waggener, for defendant.*

FOSTER, D. J., (*charging jury.*) I desire to get before your minds the facts upon which you are to pass in arriving at a verdict from the evidence in this case. There has been a great deal of discussion about the law, and some discussion upon the evidence. I will first call your attention to the issues in this case, and the facts that are admitted and uncontroverted, and the facts remaining for you to pass

upon by your verdict. It is not controverted in this case that the plaintiffs, White, Washer & King, in the month of June took to the Western Union Telegraph office, in Atchison, this dispatch for transmission to their agents at St. Louis, Missouri. It reads as follows; that is, the written part: "6-18-1879. To McGinnity, Adams & Sherry, St. Louis: Sell fifteen July wheat; sell rye fifty-two or more." When the dispatch was received by the parties to whom it was transmitted, in the place of fifteen it read fifty—"sell fifty July wheat." This is an error or mistake it seems that had occurred in the transmission of this dispatch from some cause or other, and in its transmission from Atchison to the persons to whom it was addressed in St. Louis. That in pursuance of the dispatch which they received they made a contract according to its directions and sold in the name of White, Washer & King, to some parties in St. Louis, fifty thousand bushels of wheat instead of fifteen. It is claimed here, and I believe it is admitted, that this dispatch, construed by the terms and understood by men dealing in grain, "fifteen" meant fifteen thousand July wheat. After the error was discovered, which was within a day or two, the plaintiffs in this case sought to relieve themselves from this contract, as it was not in accordance with what they intended to make; it was throwing a much larger burden and contract on them than they intended to enter into; and they had a conversation with the manager of the defendant company at Atchison, and stated the mistake and error, and the difficulty that it had got them into, and asked that the company should relieve them from it, and assume the responsibility and take the contract off their hands, or give some directions about it; that the company did not do so. Mr. Levin, agent of defendant at Atchison, states that he did not have authority to act in that matter; at any rate, defendant did not do so, and no action was taken on its part, and two days afterwards plaintiffs in this case made the best of terms they could to settle up with the other parties in St. Louis, and be relieved from the responsibility of this contract, and in doing so it appears they sustained a loss of something over \$900. They sustained damage by reason of this error, by reason of the over amount of thirty-five thousand bushels, of nine hundred and forty some odd dollars. Now they bring this suit against the Western Union Telegraph Company to recover back these damages, alleging in their petition that the Western Union Telegraph Company, its agents, servants, and employes, were guilty of carelessness or negligence in transmitting this dispatch, and thus this mistake or error occurred, and from that arose the damages.

Now, the paper upon which this dispatch is written is a form prepared by the defendant company, and in it are certain rules and regulations limiting and restricting their liability in the transmission of the dispatch, and having been signed by the plaintiffs with these terms and conditions, which they say are agreed to, this in substance forms the contract upon which this dispatch was to be transmitted. I say it in substance forms it, and limits it. There are some things, however, that are sought in this contract by the defendant company to relieve it from certain liability which the law will not permit, and that is that they cannot contract for immunity from damages occasioned by the culpable negligence or gross carelessness of their employees; and hence, if this mistake or this error arose from the culpable negligence or gross carelessness or willful neglect of the employees of the defendant company, then the defendant company would be responsible for the damages that the plaintiffs have sustained. Because, while the law imposes upon this corporation, not all the duty and responsibility of a common carrier yet they owe to the public certainly some degree of care and diligence on the part of their employees and servants to transmit and deliver the message properly and safely. I say they owe some degree, although not a high degree; perhaps a slight degree of care and diligence would be all that would be required under the law.

The burden rests upon the plaintiffs in the case to maintain the issues which they present; that is, the burden rests upon the plaintiffs to show that this error or mistake occurred through the culpable negligence or gross carelessness of the operators or employees of the defendant company. It is not sufficient for them to say there is a mistake which has occurred in transmitting this dispatch to the office of the company in St. Louis, but they must show that it occurred through the gross carelessness or culpable negligence of the employees of the defendant company. The defendant in this case, of course, denies this carelessness or negligence, and it further claims that it should be relieved from responsibility for the transmission of this dispatch because it was obscure; and there is a stipulation in this printed matter, upon this form, in which it stipulated for immunity for the transmission of dispatches in cipher or obscure messages. That is a reasonable stipulation, and an alternative restriction that the law would permit the company to make; that is, if the dispatch is in cipher or obscure, that they do not understand the meaning of it, if the operator does not understand the meaning of it, and did not understand the importance of the dispatch, and the necessity

of using care and diligence, and damages in consequence of that might result and naturally follow from a failure to transmit the dispatch correctly, then the law says, if the operator did not understand it, the company should not be held responsible for the damage. So these are the two questions I wish to submit to you for your determination: *First*, were the agents, servants, and employes, or operators, (perhaps I might confine it,) guilty of culpable negligence or gross carelessness in transmitting this dispatch, and did the error or mistake arise from that culpable negligence or gross carelessness? *Next*, did the operators or employes understand what this dispatch meant, or was it obscure? These are the two questions, gentlemen of the jury, for you to determine; and I have formulated the law upon these two questions, and will read it to you. If you find from the evidence that the telegram in question was erroneously and incorrectly transmitted or received through the culpable or gross negligence of the operators in the employment of the defendant company, either at Atchison or St. Louis, or both, and that the operators understood the meaning of said telegram, then the plaintiffs are entitled to a verdict.

But if you should find from the evidence that the error was not occasioned by reason of the culpable negligence of the defendant's operators, but occurred through climatic influences, such as storms, lightning, rain, or other causes temporarily affecting the insulation of the wires, or affecting the working of the instruments, then the defendant is not responsible for the error, and is entitled to a verdict; or if this dispatch was obscure, and the operators did not understand the meaning of it, then they should not be held responsible.

Upon that point, gentleman of the jury, you have heard detailed here by the witnesses who are experts; that art, as understood at this time, is subject, under certain circumstances, to difficulties and uncertainties, and hence the reasonableness of the telegraph company to limit their legal responsibility in the transmission of dispatches; and those uncertainties and difficulties, as you have heard detailed here by the witnesses, result from various causes, mostly from climatic influences or the state of the weather. It may affect the insulation of the wires, or by striking against some other obstruction, or by being overcharged with electricity. When these things occur the witnesses tell you that they find difficulty in transmitting and receiving dispatches correctly; that the art has not become so perfect but that under certain circumstances during storms, and under certain circumstances which I have related, there is more

difficulty in transmitting dispatches; and the use of care and diligence, even, will not enable them under all circumstances to transmit the dispatches just as they should be transmitted. These things, of course, should be considered and given their proper weight, and it is for you to determine. You have heard the evidence on the other side, when the weather is clear and fair, and the line in perfect order and the instruments all right, that nothing but unwarranted carelessness or gross negligence would result in an error of this kind. This is the testimony of the witnesses on the part of the defense, and they substantially state that when the line is in order, and the instrument in order, the dispatch should be sent, unless the operator was grossly and culpably negligent, and received at St. Louis in just the exact words desired. You have heard the evidence as to the condition of the weather; you have heard the evidence as to the difficulty that the operator at St. Louis says he experienced in getting this dispatch; you have heard his testimony, that he thought there was some difficulty on the line somewhere; there seemed to be something the matter.

Now, was that error or mistake occasioned by reason of the difficulty on the line, arising from the weather or something interfering with the insulation of the wires, or something of that kind; or was it simply a matter of wanton carelessness or gross negligence on the part of either the operator sending, or the operator receiving, this message. Gentlemen, you have to determine this from the evidence in the case. If the said dispatch was not obscure to the defendant's operators, and a slight degree of care and caution on their part would have prevented the said error, and they failed to exercise such degree of care and diligence in transmitting said dispatch, then said defendant is liable for any damages occasioned the plaintiffs by reason thereof; that is, the defendant and its operators are only held to a slight degree of care and diligence.

If, however, the dispatch was obscure to the operators, or if said operators did use such slight degree of diligence to transmit said dispatch correctly, then the company is not liable in damages. Now, upon that point, as to whether that dispatch was obscure to the agent or operator of the company, that means, in substance, did the operator understand what it meant? You will have to recollect the testimony upon that point. The testimony in reference to that is that the dispatch was in the form used by men dealing in grain; that it was a form well understood by members of the board of trade in large cities and in St. Louis where this dispatch was sent; that defendant was

transmitting a multitude of dispatches each day during the grain season, and other parties than plaintiff were sending dispatches couched in similar terms; and the statement of Mr. Levin, who was the manager of defendant there, and he did not deny but what he understood it, and because he understood it he thought the other operator did. Here you have, gentlemen, the evidence as to that. It is for you to determine from all the evidence whether it is reasonably established and shown from the evidence in the case that the operators sending and receiving this dispatch understood what it meant.

There has been some talk here to the jury about dealing in options, etc., and an instruction asked on that point, which I have refused to give. In fact, I did not know there was any such evidence before the jury until the deposition was read by Mr. Everest, attorney for defendant, in his argument as evidence for the defendant; but we have Mr. King, saying that it was a real transaction; that they were grain dealers; they had some grain there, and they had contracted for the balance of it with farmers, expecting to fill the contract. I did not know there was anything on the other side; nothing was read until the argument was made. I do not think anything was sent to the jury. The defendant asks for certain instructions, some of which, although I may have given them to you, I will give certain of them as asked for, the others I refuse. Those I give are as follows: The jury are further instructed that while the dispatch in question might be understood among grain men to mean 50,000 bushels of wheat, to be delivered at any time during the month of July, 1879, yet said message, reading on its face, "Sell fifteen July wheat," would not of itself convey to the defendant or its agents any such nature or character of the dispatch, and in order for plaintiffs to recover they must establish by a preponderance of the evidence, to the satisfaction of the jury, that the agent of the defendant receiving such dispatch for transmission was informed or knew the true meaning and nature of the dispatch; that the operator was informed, or knew without being informed, if he had the information before. In order that defendant or its agents might have observed the precaution necessary to guard against the risk which might be incurred, its true intent and meaning should have been disclosed to it or its agents, and unless the jury find from the evidence that the nature and character of the dispatch were disclosed to or understood by the agents who received and transmitted such dispatch, then the plaintiffs are entitled to only nominal damages, which is the cost of sending the message, and which, in this case, is admitted to be the sum of 50 cents.



The jury are instructed that in this case it is incumbent on the plaintiffs to establish by a preponderance of the evidence every fact necessary or essential for their recovery, and the mere fact that a mistake was made in the message transmitted would not of itself authorize any recovery against defendant for anything more than nominal damages, which, in this case, is the cost of the message sent.

The jury are further instructed that before they can find for the plaintiffs for more than nominal damages the plaintiffs must establish to the satisfaction of the jury, by a preponderance of the evidence, something more than the mere fact that a mistake was made in the transmission of the message, but must further so establish that such mistake was on account of gross negligence, or willful misconduct of the defendant or its agents, in the transmission of such message; and if the jury find from the evidence that the defendant exercised ordinary care in the transmission of such message, and no demand was made by plaintiffs to have such message repeated, then under the terms of the contract under which such message was sent, plaintiffs can recover only the costs of sending such message. The jury are instructed that in this case in no sense is the defendant to be held liable as a common carrier or subject to the rule governing common carriers; nor is the defendant to be held as an insurer of the correct transmission of the message; nor is the defendant liable for a failure to exercise extraordinary care, or failure to exercise even ordinary care and diligence, in the transmission of this message, the same being an unrepeatd message, and before the plaintiffs can recover any more than nominal damages herein, which is the price of sending the message, it is incumbent on the plaintiffs to establish by preponderance of the evidence that the defendant, its agents, or servants were guilty of gross negligence or willful misconduct in its duty herein. Gross negligence means that want of care which a person habitually careless and negligent would ordinarily exercise in business transactions, and in this case neither the highest degree of care and diligence was required of defendant, as nothing beyond the exercise of slight care was required or demanded of defendant.

The jury are instructed that the defendant would not be liable for errors or imperfections in transmitting the message which arose from causes not within its control,—that is, failure of the electrical current, irregularities in its power or efficiency, and interruptions or confusions arising from storm or wind, heat or cold; nor from imperfections in the working of the wire arising from necessary imperfections or inherent characteristics in the metals, or from things necessarily

pertaining to the business of communicating by telegraph, or the machinery and implements invented for the purpose.

On the part of the plaintiffs I give you the following: If the jury believe from the evidence that the mistake was made in transmitting the message through the gross negligence of the defendant or its agents and servants and that plaintiffs suffered damage by reason of such mistake in transmitting said message, the defendant is responsible for such damage, although the jury may believe from the evidence that plaintiff used one of the forms of defendant having the terms printed at the top, as shown by the form set up in the answer to plaintiffs' petition, and that said plaintiffs assented and agreed to such terms, and did not require said message to be repeated, or its correct transmission insured.

Gentlemen of the jury, if you find for the plaintiffs in this case—if you find the plaintiffs are entitled to a verdict—the measure of damage will be \$943.05, with interest at 7 per cent. from the date of the demand, which is July 11, 1879; unless you should believe their right to recover upon the obscurity of the dispatch, or the liability of the company arising alone on the obscurity of the dispatch: in that case I would say as defendant claims, that plaintiffs are entitled to nominal damages only, it does not deny but what it is liable for cost of sending the message. You will find either one thing or the other.

Gentlemen, you have got the form of the verdicts, and will fill the blanks as you may find and assess the damages.

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**TELEGRAPH COMPANIES—THE NATURE OF THEIR SERVICE.** A telegraph company is a public agency, and is subject to public regulation and control.<sup>(a)</sup> It is bound, therefore, to receive and transmit messages for all impartially; and it cannot give a preference to one individual or corporation over another. To this extent its nature and duties are those of a common carrier, and it would seem to follow that, as regards its liabilities for the performance of its functions, it should be held to the same extent as a common carrier under the rules of the common law. In an early case in California,<sup>(b)</sup> the court went as far as this. "The rules of law which govern the liability of telegraph companies," said BALDWIN, J., "are not new. Such companies hold themselves

(a) *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. St. 302; *Bartlett v. Western U. Tel. Co.* 62 Me. 217; *De Rutte v. New York, etc., Tel. Co.* 30 How. Pr. 413; 1 Daly, 517; *Wann v. Western U. Tel. Co.* 37 Mo. 481; *Tyler v. Western U. Tel. Co.* 74 Ill. 168;

*Parks v. Alta California Tel. Co.* 13 Cal. 422; *Passmore v. Western U. Tel. Co.* 78 Pa. St. 242; *Ellis v. American Tel. Co.* 13 Allen, 226.

(b) *Parks v. Alta California Tel. Co.* 13 Cal. 422.

out to the public as engaged in a particular branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is or may be attended with the same consequences; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules." A similar opinion was expressed in the English court of common pleas in 1855,(c) JERVIS, C. J., saying that the defendant company was "in the nature of a carrier who would have a certain liability imposed upon him at common law, but they might limit this liability by special notice, as a carrier could, subject to the condition or qualification that they could not limit it to the extent of protecting themselves against the consequences of their gross negligence." Later English cases(d) appear to qualify this expression; but the absorption of the telegraph companies in Great Britain by the government changes their relation to the people of that country to a considerable extent. In the United States, excepting a *nisi prius* decision of little authority,(e) the rule of the California court has not been followed, and telegraph companies are not held to the extraordinary responsibilities of common carriers; that is to say, they are not insurers of the correct transmission of the messages received by them, excepting the act of God and the public enemy.(f) The reasons for this doctrine are generally said to be best stated by JOHNSON, J., in a case decided in New York in 1866: "The business in which the [company] is engaged, of transmitting ideas only from one point to another by means of electricity, operating upon an insulated and extended wire, and giving them expression at the remotest point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated can have very little just and proper application to the former. And all attempts heretofore made by courts to subject the two kinds of business to the same legal

(c) McAndrew v. Electric Tel. Co. 17 C. B. 3.

(d) Dickson v. Renters' Tel. Co. 3 C. P. Div. 7; 2 C. P. Div. 62.

(e) Bowen v. Lake Erie Tel. Co. 1 Amer. Law Reg. 686; Allen, Tel. Cas. 7.

(f) Binney v. New York, etc., R. Co. 13 Md. 341; New York, etc., Tel. Co. v. Dryburg, 35 Pa. St. 238; Shields v. Washington, etc. Tel. Co. 11 Amer. Law T. 311; Allen, Tel. Cas. 7; De Rutte v. New York, etc., Tel. Co. 1 Daly, 547; Breese v. United States Tel. Co. 45 Barb. 274; Western U. Tel. Co. v. Ward, 23 Ind. 377; Western U. Tel. Co. v. Carew, 15 Mich. 525; Ellis v. American Tel. Co. 13 Allen, 26; United States Tel. Co. v.

Gildersleeve, 28 Md. 232; Baldwin v. United States Tel. Co. 45 N. Y. 744; 54 Barb. 506; 6 Abb. Pr. (N. S.) 405; 1 Lans. 125; Leonard v. New York, etc., Tel. Co. 41 N. Y. 544; Passmore v. Western U. Tel. Co. 78 Pa. St. 238; Bryant v. American Tel. Co. 1 Daly, 575; De Rutte v. New York, etc., Tel. Co. 30 How. Pr. 403; 1 Daly, 517; Wann v. Western U. Tel. Co. 37 Mo. 472; Washington, etc., Tel. Co. v. Hobson, 15 Grat. 122; Bartlett v. Western U. Tel. Co. 62 Me. 209; Western U. Tel. Co. v. Fontaine, 18 Ga. 433; Camp v. Western U. Tel. Co. 1 Metc. (Ky.) 164; Aiken v. Tel. Co. 5 S. C. 253.

rules and liabilities will, in my judgment, sooner or later have to be abandoned as clumsy and indiscriminating efforts and contrivances, which have no natural relation or affinity whatever, and at best but a loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another, if such was his business or employment, might very properly be called and held a common carrier; while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs of speech, to be communicated in like manner. The former would have something which is or might be the subject of property, capable of being lost, stolen, or wrongfully appropriated, while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation even by the king's enemies."(*g*)

**DEGREE OF CARE AND DILIGENCE REQUIRED.** Nevertheless, the degree of care which telegraph companies are bound to exercise, if properly laid down and applied, will, perhaps, render their service as efficient, so far as the public is concerned, as though they were held to the engagement of insurers. Not that there have not been considerable difference of opinion and some apparently illogical reasoning in the courts. Thus some courts, as in the principal case, have held them to a very low degree of care, while others have adopted a better standard. "Due and reasonable care,"(*h*) "exact diligence,"(*i*) "ordinary care and diligence,"(*j*) are phrases which have been used to describe this latter requisite. They, however, all tend to require on the part of the companies "the use of good apparatus and instruments, and reasonable skill, and a high degree of care and diligence in their operation."(*k*)

**POWER TO LIMIT LIABILITY.** It being now settled by an overwhelming weight of authority that a common carrier may limit his liability by a special contract made with his customer,"(*l*) it is hardly possible to doubt that the same freedom to enter into agreements prescribing the methods of carrying out its service, and the circumstances under which it is to be liable, must be given to a telegraph company. Accordingly, it has been expressly held in a number of cases that a telegraph company may limit its ordinary liability by a contract or a notice assented to by the sender of the message."(*m*)

**NEGLIGENCE CANNOT BE CONTRACTED AGAINST.** But a common carrier is not permitted to get rid of its liability for an act of negligence on its part by a contract or agreement with its customer.(*n*) Neither, and for the same

(*g*) *Breeze v. United States Tel. Co.* 45 Barb. 274; 31 How. Pr. 86.

(*h*) *Ellis v. American Tel. Co.* 13 Allen, 226.

(*i*) *Passmore v. Western U. Tel. Co.* 78 Pa. St. 238.

(*j*) *Baldwin v. United States, etc., Tel. Co.* 13 Allen, 226.

(*k*) *Western U. Tel. Co. v. Carew*, 15 Mich. 525.

(*l*) See *Lawson on Carriers*, § 28 et seq. and cases cited.

(*m*) *McAndrew v. Electric Tel. Co.* 17 C. B. 3; *Young v. Western U. Tel. Co.* 65 N. Y. 163; *Breeze v. United States Tel. Co.* 48 N. Y. 132; *De Rutte v. New York, etc., Tel. Co.* 1 Daly, 547; *Sweatland v. Illinois, etc., Tel. Co.* 27 Iowa, 433;

*Manville v. Western U. Tel. Co.* 37 Iowa, 214; *Western U. Tel. Co. v. Buchanan*, 35 Ind. 429; *Western U. Tel. Co. v. Tyler*, 74 Ill. 168; 60 Ill. 421; *Passmore v. Western U. Tel. Co.* 78 Pa. St. 238; 9 Phila. 90; *Harris v. Western U. Tel. Co.* 9 Phila. 88; *Wolf v. Western U. Tel. Co.* 62 Pa. St. 83; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western U. Tel. Co.* 37 Mo. 473; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; *Camp v. Western U. Tel. Co.* 1 Metc. 164; *Western U. Tel. Co. v. Graham*, 1 Cal. 230; *Ellis v. American Tel. Co.* 13 Allen, 226; *Redpath v. Western U. Tel. Co.* 112 Mass. 71; *Grinnell v. Western U. Tel. Co.* 113 Mass. 299.

(*n*) *Lawson on Carriers*, § 28 et seq.

reasons of public policy, can a telegraph company escape liability for the consequences of the negligence of itself or its duly-authorized agents.<sup>(o)</sup> Some courts, however, have restricted this lack of power to contract, to what is called "gross" negligence.<sup>(p)</sup> A better rule, however, has been laid down in the majority of the decisions, viz., that notwithstanding a condition in the contract between the sender and the company, the latter will still be liable for mistakes happening in consequence of its own fault, such as want of proper skill, or ordinary skill, on the part of its operatives, or the use of defective instruments, but will not be liable for mistakes occasioned by causes beyond its control, such as atmospheric changes, or the vagaries of electricity, provided these mistakes could not have been avoided by the exercise of ordinary care and skill on the part of the operating agents of the company.<sup>(q)</sup>

**CONDITIONS AS TO REPEATING MESSAGES.** The blanks of a telegraph company usually contain a condition that if the message is not repeated—for which service an extra charge is asked—the company shall not be liable beyond a certain small amount; generally the sum paid for the telegram, or fifty times its amount. Such conditions are sustained as reasonable; but at the same time they are not allowed to exclude the company's liability for negligence.<sup>(r)</sup> They are, however, a sufficient protection where the mistake or delay is not due to the negligence of the company or its servants.<sup>(s)</sup>

**OTHER CONDITIONS.** Other conditions have been sustained as reasonable, viz., that the company shall not be liable unless the claim is presented within 60 days after sending the message.<sup>(t)</sup>

**KNOWLEDGE BY SENDER OF CONDITIONS.** Of course there can be no contract between the sender and the company, which the latter can set up to restrict its liability, unless it has been assented to by the former. But notice of the company's regulations, and the conditions which it seeks to put upon the sender, are given to him by printing them on the blanks upon which the message is written, and by the sender using the blanks without dissent he is taken to assent to the conditions which they contain,<sup>(u)</sup> and he will not be

(o) McAndrew v. Electric Tel. Co. 17 C. B. 1; Western U. Tel. Co. v. Buchanan, 35 Ind. 429; True v. International Tel. Co. 60 Me. 19; Breese v. United States Tel. Co. 48 N. Y. 132; Redpath v. Western U. Tel. Co. 112 Mass. 71; Grinnell v. Western U. Tel. Co. 113 Mass. 299; Ellis v. American Tel. Co. 13 Allen, 226; Candee v. Western U. Tel. Co. 34 Wis. 471; Western U. Tel. Co. v. Fontaine, 58 Ga. 433; Wann v. Western U. Tel. Co. 37 Mo. 472; Dorgan v. Telegraph Co. 1 Amer. Law T. Rep. 406; Sweatland v. Illinois, etc., Tel. Co. 27 Iowa, 433.

(p) As in Redpath v. Western U. Tel. Co. 112 Mass. 71; Grinnell v. Western U. Tel. Co. 113 Mass. 299.

(q) Sweatland v. Illinois, etc., Tel. Co. 27 Iowa, 433; Manville v. Western U. Tel. Co. 37 Iowa, 214; Passmore v. Western U. Tel. Co. 78 Pa. St. 233; 9 Phila. 88; Candee v. Western U. Tel. Co. 34 Wis. 471; Western U. Tel. Co. v. Tyler, 74 Ill. 163; 60 Ill. 421; Aiken v. Telegraph Co. 5 S. C. 358; Western U. Tel. Co. v. Graham, 1 Col. 230.

(r) Sprague v. Western U. Tel. Co. 6 Daly, 200; Baldwin v. United States Tel. Co. 45 Barb. 506; 1 Lans. 126; 6 Abb. Pr. (N. S.) 195; 45 N. Y. 744; Bryant v. American Tel. Co. 1 Daly, 75; New York, etc., Tel. Co. v. Dreyburg, 35 Pa. St. 298; 3 Phila. 403; Dorgan v. Telegraph Co. 1 Amer. Law T. Rep. 406; True v. International Tel. Co. 60 Me. 9; Binney v. New York, etc., Tel. Co. 18 Md. 341; Western U. Tel. Co. v. Graham, 1 Cal. 30; Manville v. Western U. Tel. Co. 37 Iowa, 214; Western U. Tel. Co. v. Fenton, 52 Ind. 1; Hibbard v. Western Union Tel. Co. 33 Wis. 553; Seiler v. Western Union Tel. Co. 3 Amer. Law Rev. 777.

(s) Id.; Schwartz v. Atlantic, etc., Tel. Co. 18 How. 157; Becker v. Western Union Tel. Co. 11 Neb. 87.

(t) Young v. Western Union Tel. Co. 65 N. Y. 163; Wolf v. Western Union Tel. Co. 62 Pa. St. 83.

(u) Western Union Tel. Co. v. Carew, 15 Mich. 255; De Rutte v. New York, etc., Tel. Co. 1 Daly, 547; 30 How. Pr. 403.

permitted to show that he did not read or understand the conditions.(v) For the same reason, if a person is familiar with the regulations of the company—as by having sent previous messages—he will be taken to have assented to those conditions if he sends a dispatch written on a business card of his own.(w)

**BURDEN OF PROOF.** From the fact that the company has failed to deliver the message as sent, the presumption of negligence arises, and the burden of proof is therefore on the company to show that the failure arose from a cause for which they are not legally responsible to answer.(x)

**REFUSAL TO TRANSMIT.** We have seen(a) that the company cannot legally refuse to send a message for any one tendering, and that it cannot give a preference to one person or corporation over another.(b) It has been held that it may refuse to send a dispatch which is expressed in indecent, obscene, or filthy language; but that, if such does not appear on the face of the dispatch, it cannot justify a refusal to transmit it, on the ground that the message was sent for an illegal or immoral purpose.(c)

**MEASURE OF DAMAGES.** The rule as to the measure of damages in actions against telegraph companies is well stated by EARL, C. J., in a New York case:(d) “The damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. \* \* \* A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts.” As a rule, the actual damages sustained by the plaintiff are recoverable. Thus, where a dispatch ordering “one shawl,” which, when delivered, read “one hundred shawls;” (e) where the message, as delivered to the operator, read “two hand bouquets,” but, as delivered to the receiver, read “two hundred bouquets;” (f) where the company delivered an incorrect market report;(g) where the message was never sent as ordered;(h) where an

(v) Grinnell v. Western Union Tel. Co. 113 Mass. 299; Redpath v. Western Union Tel. Co. 112 Mass. 71; Reese v. United States Tel. Co. 48 N. Y. 132; 45 Barb. 174; Young v. Western Union Tel. Co. 65 N. Y. 163; Wolf v. Western Union Tel. Co. 62 Pa. St. 83; Western Union Tel. Co. v. Buchanan, 35 Ind. 429.

(w) Western Union Tel. Co. v. Buchanan, 35 Ind. 429.

(x) Baldwin v. U. S. Tel. Co. 45 N. Y. 744; De Rutte v. N. Y. Tel. Co. 1 Daly, 547; 30 How. Pr. 413; Rittenhouse v. Independent Line, 44 N. Y. 23; Turner v. Hawkeye Tel. Co. 41 Iowa, 458; Bartlett v. Western Union Tel. Co. 62 Me. 203; Dorgan v. Telegraph Co. 1 Amer. Law T. Rep. 46; Western Union Tel. Co. v. Carew, 15 Mich. 525; Tyler v. Western Union Tel. Co. 74 Ill. 168; 60 Ill. 421. Contra, Sweatman v. Illinois,

etc., Tel. Co. 29 Iowa, 433; United States Tel. Co. v. Gildersleeve, 29 Md. 232.

(a) Ante, § 1.

(b) See, also, Western Union Tel. Co. v. Ward, 23 Ind. 377; United States Tel. Co. v. Western U. Tel. Co. 56 Barb. 46; Davis v. Western Union Tel. Co. 1 Cin. 100.

(c) Western Union Tel. Co. v. Ferguson, 57 Ind. 495.

(d) Leonard v. New York, etc., Tel. Co. 41 N. Y. 514.

(e) Bowen v. Lake Erie Tel. Co. 1 Amer. Law Reg. 685.

(f) New York, etc., Tel. Co. v. Dreyburg, 3 Phila. 408; 35 Pa. St. 298.

(g) Turner v. Hawkeye Tel. Co. 41 Iowa, 458.

(h) Sprague v. Western U. Tel. Co. 52 Ind. 1; Manville v. Western U. Tel. Co. 37 Iowa, 214; De Rutte v. New York, etc., Tel. Co. 1 Daly, 547; 30

order for 5,000 "sacks" of salt was delivered as calling for 5,000 "casks;"(i) where there was a mistake in a message ordering stock sold and other stock purchased;(j) where wheat was ordered to be purchased at "22" and the message, as delivered, said "25;"(k) where the name of the receiver was misspelled,(l)—in all these cases the actual damages sustained by the parties were recovered.

But, on the other hand, where the company is at fault, it cannot be held liable where this fault is not the proximate cause of the loss. Thus, A. telegraphs to B. to send him \$500. The message, as negligently delivered, asked for \$5,000. In accordance with the request B. sent \$5,000, which A. absconded with. It was held that the company was not responsible at the suit of B.(m) And uncertain and contingent profits are not recoverable;(n) nor are any damages recoverable where the terms of the message, as delivered to the operator, are obscure, and are so unintelligible to him that he is unable to understand its import or its importance. But this rule is subject to the qualification that the agents of a telegraph company will be held to possess such experience as to enable them to comprehend what might be unintelligible to others; in other words, the employees of telegraph companies will be presumed to be acquainted with the language of merchants, and the forms used by business men in telegraphing their orders, replies, and contracts.(o)

**CONNECTING LINES.** The decisions are not uniform as to the company's liability for an injury on a connecting line. Under the English rule, applicable to carriers of all kinds, the first carrier alone is liable. In some of the American states the rule is different, and the carrier on whose line the loss occurs may be sued. On the other hand, a telegraph company receiving a message directed to a place beyond its lines, and receiving payment for the extra service, is liable for the negligence of any connecting line, for they are its agents in the service, and not the sender's.(p)

**WHO MAY BRING ACTION.** In England, the recipient of a message cannot maintain an action against the company for damages caused by its negligence. The obligation on the part of the company is one of contract with the sender, to which the receiver is not a party, and under which he can claim no rights. In the United States this technical rule is not recognized, but a telegraph company may be sued by the party to whom a message is addressed for damage resulting from its neglect.(q)

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How. Pr. 403; Davis v. Western U. Tel. Co. 1 Cin. 100; Parks v. Alta California Tel. Co. 13 Cal. 422.

(i) Leonard v. New York, etc., Tel. Co. 41 N. Y. 554.

(j) Rittenhouse v. Indiana, etc., Tel. Co. 1 Daly, 474; 44 N. Y. 263.

(k) De Rutte v. New York, etc., Tel. Co. 1 Daly, 547.

(l) Lausberger v. Magnetic, etc., Tel. Co. 32 Barb. 530.

(m) Lowery v. Western Union Tel. Co. 60 N. Y. 198. And see Western Union Tel. Co. v. Meyer, 61 Ala. 163.

(n) Kinghorne v. Montreal Tel. Co. 18 U. C. Q. B. 60; Lane v. Montreal Tel. Co. 7 U. C. C. P. 73;

Beaupre v. Pacific, etc., Tel. Co. 21 Minn. 155; Breese v. United States Tel. Co. 45 Barb. 275; Hibbard v. Western U. Tel. Co. 33 Wis. 558; Western U. Tel. Co. v. Graham, 1 Col. 230; Squire v. Western U. Tel. Co. 98 Mass. 232; True v. International Tel. Co. 60 Me. 9; McCall v. Western Union Tel. Co. 7 Abb. N. C. 151.

(o) Thomp. Neg. 857, and cases cited.

(p) De Rutte v. Albany, etc., Tel. Co. 1 Daly, 547.

(q) New York, etc., R. Co. v. Dreyburg, 35 Pa. St. 298; Elwood v. Western Union Tel. Co. 45 N. Y. 549; Rose v. United States Tel. Co. 6 Rob. 305; Western Union Tel. Co. v. Carew, 15 Mich. 525.

*In re Ho King.**(District Court, D. Oregon. January 15, 1883.)*

## 1. LABORER.

The term "laborer" is used in the treaty with China of November 17, 1880, and the act in aid thereof, of May 6, 1882, in its popular sense, and does not include any person but those whose occupation involves physical toil, and who work for wages.

## 2. ACTOR.

A Chinese actor or theatrical performer is not a "laborer," within the purview of said treaty or law; and such person is, therefore, entitled to come to and reside in the United States at pleasure.

## 3. SECTION 6 OF THE ACT OF 1882.

The certificate provided for in section 6 of the act of May 6, 1882, is not the only competent evidence that a Chinese person is not a laborer, and therefore entitled to come to and reside within the United States, but the fact may be shown by any other pertinent and convincing testimony.

*Habeas Corpus.*

*William H. Adams*, for petitioner.

*James F. Watson*, for respondent.

DEADY, D. J. This is a proceeding by *habeas corpus* to procure the deliverance of one Ho King for an alleged unlawful restraint upon his liberty. The writ issued upon the petition of Lo Wy, a subject of the Chinese empire, residing in Portland, and upon the allegation therein that King was not permitted to bring it himself, and was directed to W. Jarvis, the master of the steam-ship T. C. Hook, under whose restraint King was alleged to be. The respondent brings the body into court, and for return to the writ says that on November 25, 1882, at the port of Hong Kong, Ho King took passage on the steam-ship T. C. Hook, whereof the respondent then was and now is the master, for a voyage to Honolulu via Victoria, B. C., and Portland, Oregon; that said vessel has proceeded on said voyage as far as this port, where it arrived on January 9, 1883, with said King on board; that said King is an actor or theatrical performer by occupation or profession, and is not provided with a certificate from the Chinese government showing his right to land in the United States, as is required by section 6 of the act of May 6, 1882, "to execute certain treaty stipulations relating to China," and therefore the respondent, being advised and believing that said King was not entitled to land in the United States, and that it would be unlawful to permit him to go ashore in this port, has and does restrain him of his liberty so far as to detain him on board said steam-ship, and not otherwise. To this



return there is a demurrer filed. Upon the argument of the demurrer two questions were made:

(1) Is an actor a "laborer" within the meaning of that term as used in the Chinese treaty and act of May 6, 1882; and (2) is the certificate prescribed in section 6 of that act the only competent means of proving that a Chinese desiring to come and reside in the United States is not such a laborer.

The term "laborer" is defined by Worcester as follows: "One who labors; one regularly employed at some hard work; a workman; an operative;—often used of one who gets a livelihood at coarse manual labor, as distinguished from an artisan or professional man;" and the definition given by Webster is to the same effect. The term "laborer" is used in the supplementary treaty with China of November 17, 1880, and also of the act of May 6, 1882, by section 15 of which it is made to include "both skilled and unskilled laborers," in its popular sense, and includes only persons who perform physical labor for another for wages. It does not, therefore, include an actor any more than it does a merchant or teacher.

In the *matter of Lee Yip*, lately decided by Mr. Chief Justice GREENE, of Washington, and reported in the *Seattle Chronicle* of January 4, 1883, the learned judge, in speaking of the word "laborer," as used in this treaty and act, says:

"The term has been used in common English speech time out of mind, and in the statutes of English-speaking people from the first statute of laborers of 23 Edw. III. till to-day, to denote a comprehensive, varied, and varying class in society, rather difficult accurately to define. There is nothing in the treaty to indicate that it is used in other than that prescriptive sense. That is the sense, therefore, that should be given it both in the treaty and in the statute. This sense is a much narrower one than etymologically belongs to the word. Etymologically, a laborer is one who labors. He may labor physically or mentally, gratuitously or for reward, for himself or for another, freely or under control. However he labors he is in the broad sense a laborer. But that sense is never imputed in ordinary speech or writing, unless there is something in the context or the circumstances to imply that it is intended. \* \* \* A laborer, in the sense of this statute and this treaty, is one that hires himself out or is hired out to do physical toil. Physical toil is essential to the definition. So, also, is a contract, express or implied, to submit for wages the person who is to do the toil to him for whom it is to be done. \* \* \* He is not a laborer, who works with his hands in his own business, but he is one who is hired out or hires himself out to that in another's business."

Neither the treaty nor the act have in view the protection of what are called the professional or mercantile classes, or those engaged in mere mental labor, from competition with the Chinese. No grievance of this kind was ever complained of; and the language of the remedy

provided, plainly indicates that it was not contemplated by either of the parties to the treaty, or the congress that passed the act. As was said by me *In re Moncan*, 14 FED. REP. 46, the concession in the supplementary treaty was only made to allow the United States "to limit or suspend the existing right of Chinese laborers to come and be within its territory, for the purpose of laboring therein and thereby competing with the labor of its citizens for the local means of livelihood." A Chinese actor engaged in dramatic representations upon the stage of a Chinese theater seems as far removed from such competition as it is possible for a person to be.

It only remains to consider what effect is to be given to the fact alleged in the return that King has not the certificate prescribed in section 6 of the act of 1882.

In the case, *In re Low Yam Chow*, 13 FED. REP. 605, it was held by Justices FIELD and HOFFMAN that Chinese, not laborers, who at the passage of the act did not reside in China, were not required to produce this certificate to prove they were non-laborers, prior to being allowed to land.

The reasoning by which this conclusion is reached would justify the conclusion that the certificate is not absolutely necessary in any case.

The non-laboring classes of Chinese are still entitled by treaty stipulation to come to and reside in the United States, and to enjoy all the "rights, privileges, immunities and exemptions" which may be accorded to "the citizens and subjects of the most favored nation." U. S. Pub. Treat. 148; Treaty of Nov. 17, 1880; Sess. Laws, 1881-2, p. 12.

If section 6 of the act of 1882 is construed to absolutely require the production of the certificate therein provided for, before a Chinese who is not a laborer can come within the United States, then it will operate as a serious restriction upon the right and privilege given him by the treaty, because in this respect no such condition or restriction is imposed upon any subject of any other nation.

Indeed, the fact of being compelled to make proof of his condition or character at all, is a burden and inconvenience upon the Chinese coming to the United States which is not required of any other immigrant or visitor coming to this country. But probably this much is unavoidable under the circumstances, and must be submitted to as a necessary incident of the right of the United States, under the amended treaty, to exclude from the country Chinese laborers. But the treaty, (article 1,) in conceding this right, is careful to specify

that "legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration." It may be admitted that, taken literally, section 6 of the act of 1882 does impose this condition. But in construing a statute it is often necessary to go deeper into the matter than the mere letter. As was said *In re Moncan, supra*, "it is not to be presumed that congress, in the passage of this act, intended to trench upon the treaty of 1868, as modified by that of 1880; and therefore it is that all general or ambiguous clauses or phrases contained in the former should be construed and applied so as to make them conform to the latter. To the same effect is the ruling *In re Low Yam Chow, supra*.

Read, then, in the light of the treaty, and considered as an aid, rather than an impediment, to its enforcement, this section 6 ought to be construed as a declaration on the part of the United States that for the purpose of facilitating the entry into the country of the Chinese not within the prohibition, it will accept the certificate of the Chinese government that the bearer is not a laborer, and is *prima facie* entitled, under the treaty, to come into the United States at pleasure; but that, in the absence of such certificate, a Chinese claiming the right to enter and reside in the United States must establish the fact that he is not a laborer by evidence, as in ordinary cases of the *ex parte* proof of a fact.

But it is not to be presumed that any one will resort to this method of proof unless compelled to do so by some cogent reason or controlling emergency; for it stands to reason that it is easier for a Chinese to obtain this certificate from a friendly tribunal in his own country, where the means of proof are at hand, and the mode of procedure familiar to him, than to establish the facts contained in it by original evidence in a strange country, before officers and tribunals apt to regard him with suspicion and disfavor.

Upon this point, Chief Justice GREENE has reached a similar conclusion. In the case of *Lee Yip, supra*, he says:

"Congress did not construct their law in order to annul, override, or in any degree abate aught granted in the treaty. They provided certificates for the benefit and security of the privileged classes. Non-production of a certificate is a circumstance which, if alone and unexplained, may properly be regarded as proof that the person lacking it is one who is prohibited. But its non-production is open to explanation, and the presumption arising from its non-production to contradiction. Whenever the question of a right under the treaty comes before the court, evidence may be heard to establish the right."

In this case the fact that King belongs to the privileged class is established in the judgment of the court by the admission that he is an actor, of which there is not a particle of doubt. The non-production of the certificate is also satisfactorily explained by the fact stated in the return, that he did not leave China with the intention to come to the United States, but to go to Honolulu, but for some reason, having been brought here by the respondent before being taken to Honolulu, he prefers to remain here for the present, at least, as he has a perfect right to do, if he is one of the privileged class.

The order of the court is that Ho King is discharged from the restraint imposed by the defendant and allowed his liberty, and that the petitioner recover costs

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### THE "MARK TWAIN" CASE.

CLEMENS v. BELFORD, CLARK & Co.

(Circuit Court, N. D. Illinois. January 8, 1883.)

1. AUTHORS AND WRITERS—RIGHT TO USE OF ASSUMED NAME.

An author or writer has no better or higher right in a *nom de plume*, or assumed name, than he has in his baptismal name.

2. SAME—COPYRIGHT THE SOLE PROTECTION.

A person becoming an author can secure to himself the exclusive right to his productions only by a copyright under the laws of the United States; and if he publishes anything without so protecting it, it becomes public property, and any person may republish it, and state the name of the author in such form in the book as he may choose, either upon the title-page or otherwise, as to show who was the author.

3. SAME—PROTECTION OF UNPUBLISHED WORKS.

An author has the right to restrain the publication of any of his literary work which he has never published or dedicated to the public.

4. SAME—FALSE IMPUTATION OF AUTHORSHIP.

An author may restrain the publication of literary matter purporting to have been written by him, but which in fact he never did write; and this rule applies in favor of persons known to the public under an assumed name.

5. SAME—TRADE NAME OR TRADE MARK—NOT A SUBSTITUTE FOR COPYRIGHT.

An author cannot acquire a right to the protection of his writings under an assumed name as a trade name or trade mark, and no pseudonym, however ingenuous, novel, or quaint, can give one any more rights than he would have under his own name, or defeat the policy of the law that the publication of literary matter without protection by copyright has dedicated such matter to the public.

. Thos. W. Clark, for complainant.

Hutchinson & Partridge, for defendant.

BLODGETT, D. J. The bill in this case states that complainant has, for about 20 years last past, been an author and writer by profession; that he has been in the habit for said time of publishing articles, sketches, books, and other literary matter, composed by him for publication under the name, assumed by him to designate himself as the author and writer of such sketches, articles, books, and other literary matter, of "Mark Twain;" that the said designation of "Mark Twain" has been used by him during the last 20 years as his *nom de plume* or trade-mark as an author; that his said writings, under the designation of "Mark Twain," have acquired great popularity, and met with a ready and continuous sale, and that no other person has been licensed or permitted by him to use said designation of "Mark Twain" as a *nom de plume* or designation of authorship; that the exclusive right of selecting for publication and of publishing in any collective form the sketches, articles, or other writings written and originally published by him under the said name of "Mark Twain," so as to make a book or collection of durable form for publication, by right ought to belong exclusively to him, and is of great value to him in his reputation, and a great security to the public as purchasers of the works purporting to have been written by complainant; that the said defendants have made, printed, put out, and sold, in great quantities, a certain book—called upon its title-page "Sketches by Mark Twain, now first published in complete form. Belford & Co. 1880"—containing about 369 pages, many or most of which, in one form or another, are substantially like sketches published prior to the year 1880 by complainant; and that said Belford, Clark & Co. had no authority, leave, or license from complainant, or derived from him, to make publication of the said book or any part thereof; that the defendants in their said book, so published by them, placed upon the page next succeeding the leaf whereon the title-page is printed, a preface in these words:

"I have scattered through this volume a mass of matter which has never been in print before, (such as 'Learned Fables for Good Old Boys and Girls,' the 'Jumping Frog Restored to the English Tongue after Martyrdom in the French,' the 'Membraneous Croup' sketch, and many others which I need not specify;) not doing this in order to make an advertisement of it, but because these things seemed instructive.

MARK TWAIN."

—That complainant never gave any authority, leave, or license to the defendants to print or publish any such preface, or any of the representations therein contained, or substantially the same; that complainant has, by the said wrongful acts of the defendants, been greatly

injured, and his property in the said *nom de plume* or trade-mark of "Mark Twain" as a commercial designation of authorship has been deteriorated and lessened in value; wherefore he prays damages and profits, and a writ of injunction restraining the further publication of said work, and that the plates of such book may be damasked and destroyed.

To this bill defendants have filed a special and general demurrer.

The position assumed by the complainant in this bill is that he has the exclusive right to the use of the *nom de plume* or trade-mark of "Mark Twain," assumed by him, and that defendants can be enjoined by a court of equity from using such name without the complainant's consent or license.

It does not seem to me that an author or writer has or can acquire any better or higher right in a *nom de plume* or assumed name than he has in his Christian or baptismal name. When a person enters the field of authorship he can secure to himself the exclusive right to his writings by a copyright under the laws of the United States. If he publishes anything of which he is the author or compiler, either under his own proper name or an assumed name, without protecting it by copyright, it becomes public property, and any person who chooses to do so has the right to republish it, and to state the name of the author in such form in the book, either upon the title-page or otherwise, as to show who was the writer or author thereof. "In this country an author has no exclusive property in his published works except when he has secured and protected it by compliance with the copyright laws of the United States." *Wheaton v. Peters*, 8 Pet. 591; *Clayton v. Stowe*, 2 Paine, 382; *Bartlett v. Crittenden*, 5 McLean, 32; *Pulte v. Derby*, Id. 328. "If an author would secure to himself the sole right of printing, publishing, and selling his literary compositions, he must do so under the copyright laws." *Stowe v. Thomas*, 2 Wall. Jr. 547.

The seventh paragraph of the bill charges that many or most of the sketches contained in the book complained of, "in one form or another, are substantially like sketches published prior to the year 1880 by your orator;" but it does not aver that they are or ever were protected by copyright, and by implication concedes their publication without copyright. If they were published without such protection they become public property, and may be republished by any one who chooses to do so.

Undoubtedly an author has the right to restrain the publication of any of his literary work which he has never published or given to the

public. *Little v. Hall*, 18 How. 165; *Keene v. Wheatly*, 9 Amer. Law. Reg. 33; *Bartlett v. Crittenden*, 5 McLean, 32. So, too, an author of acquired reputation, and, perhaps, a person who has not obtained any standing before the public as a writer, may restrain another from the publication of literary matter purporting to have been written by him, but which, in fact, was never so written. In other words, no person has the right to hold another out to the world as the author of literary matter which he never wrote; and the same rule would undoubtedly apply in favor of a person known to the public under a *nom de plume*, because no one has the right, either expressly or by implication, falsely or untruly to charge another with the composition or authorship of a literary production which he did not write. Any other rule would permit writers of inferior merit to put their compositions before the public under the names of writers of high standing and authority, thereby perpetrating a fraud not only on the writer whose name is used, but also on the public.

The complainant, however, does not charge in this bill that the book in question, either by the title, preface, or any other matter contained in it, attributes to him the authorship of anything which he in fact did not write.

The bill rests, then, upon the single proposition, is the complainant entitled to invoke the aid of this court to prevent the defendants from using the complainant's assumed name of "Mark Twain" in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him? That he could not have done this if these sketches had been published under complainant's proper name is clear from the authorities I have cited, but the complainant seems to assume that he has acquired a right to the protection of his writings under his assumed name as a trade name or trade mark.

This is the first attempt which has ever come under my notice to protect a writer's exclusive right to literary property under the law applicable to trade-marks. Literary property is the right which the author or publisher of a literary work has to prevent its multiplication by copies or duplication, and is from its very nature an incorporeal right. William Cobbett could have no greater right to protect a literary production which he gave to the world under the fictitious name of "Peter Porcupine" than that which was published under his own proper name. The invention of a *nom de plume* gives the writer no increase of right over another who uses his own name. Trade-marks are the means by which the manufacturers of vendible merchandise

designate or state to the public the quality of such goods, and the fact that they are the manufacturers of them; and one person may have several trade-marks, designating different kinds of goods or different qualities of the same kind; but an author cannot, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law in force in this country, that the "publication of a literary work without copyright is a dedication to the public, after which any one may republish it." No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name. The policy of the law in this country has been settled too long to be now considered doubtful, that the publication of literary matter without protection by copyright has dedicated such matter to the public, and the public are entitled to use it in such form as they may thereafter choose, and to quote, compile, or publish it as the writing of its author. That is, any person who chooses to do so, can republish any uncopyrighted literary production, and give the name of the author, either upon the title-page, or otherwise as best suits the interest or taste of the person so republishing.

Complainant does not say by his bill that the preface to the book in question was not written by him, and that by the publication of this preface, in connection with the sketches, defendants have attributed to him the authorship of something which he never wrote. If he had so charged perhaps he would have made a case entitling him to some relief.

The demurrer is sustained.

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### CONSOLIDATED SAFETY-VALVE CO. v. KUNKLE.

(Circuit Court, N. D. Illinois. January 8, 1883.)

#### PATENTS FOR INVENTIONS—STEAM-VALVE.

In an action for infringement of a patent for a steam-valve, where the idea of regulating the escape of steam by a movable plate upon a spindle in the valve-head is older than patentee's device, and was public property when his invention was made, and old English and American valves were intended to work on substantially the same principle as the valve of the complainant, but which may have failed for lack of skill in making and using them, rather than because their inventors had not conceived the true principle upon which they were to work, *held*, that the use of a similar valve by defendant was not an infringement of complainant's patent.

In Equity.



*Thomas W. Clark*, for complainant.

*J. H. Raymond*, for defendant.

BLODGETT, D. J. This is a suit to enjoin the alleged infringement by defendant of two patents issued to George W. Richardson,—one, No. 58,294, dated September 25, 1866, for an “improvement in safety-valves;” and the other, No. 85,968, dated January 19, 1869, for an “improvement in safety-valves.” The defenses relied upon are (1) that defendant does not infringe; (2) that complainant’s patents are void for want of novelty, and for uncertainty in the specifications and claims. The peculiar feature of these two patents is what is termed by the experts the stricture, the operation of which is to secure an additional lifting force on the head of the valve beyond that of the initial pressure inside of the steam generator; and the second patent, which purports to be an improvement on the first, has an arrangement by which this stricture is made adjustable by a peculiar device, which is minutely described. These patents have been several times before the courts, and so far considered, in the light of the state of the art, as to very much abridge the area for discussion or construction in this case.

In *Ashcroft v. Boston & L. R. Co.* 1 Bann. & Ard. 215, and in *Richardson v. Ashcroft*, not reported, the contest was between the Richardson patent and the Naylor patent, issued in England in July, 1863, and in this country in 1866, a month or two after the first Richardson patent, and Judge SHEPLY, before whom these cases were heard, held in the first-named case that the Richardson device did not infringe the Naylor patent, and, in the second case, that the Naylor patent did not infringe the Richardson.

The Naylor patent was for a safety-valve constructed with an extended area upon the head of the valve for the purpose of aiding in the lift, and in that respect it was claimed that Richardson infringed upon Naylor. Judge SHEPLY, in his opinion in the first-mentioned case, says:

“Without adverting to the patents of Hartley, Waterman, and other devices older than Naylor’s, we have seen that Naylor could not, with propriety, claim to have been the inventor of the combination, in a spring safety-valve, of every form of projecting, overhanging, downward-curved lip or periphery, with an annular recess surrounding the valve-seat, into which a portion of the steam is deflected as it issues between the valve and its seat.

\* \* \* \* \*

“Naylor did not invent the overhanging, downward-curved lip or periphery, nor was he the first to use an annular chamber surrounding the valve-seat, into which a portion of the steam is deflected as it issues between the valve and its seat. His claims must therefore be limited to the combination of

the other elements *with precisely such an annular recess as he has described*, and operating in the described manner, so far as such recess, separately or in combination, differed in construction and operation (if it did materially differ in those respects) from those which had preceded it. The claims cannot be made to cover a safety-valve like the Richardson valve, which, in its construction and mode of operation, is substantially different from the valve described in the Naylor patent, simply because the Richardson valve, in common with the Naylor valve, has the overhanging, downward-curved lip or periphery, and an annular recess surrounding the valve-seat, into which a portion of the steam issuing from between the valve and its seat is deflected.

"The differences between the Richardson and Naylor valves, in construction, are apparent upon an inspection of the drawings of the respective patents. The difference in the mode of operation is most clearly proved by the testimony of the experts in the case. In the Naylor valve, it appears that it was the intention of the inventor to use the impact of the issuing steam upon the concave lip of the valve to assist in lifting it, and only this, except so far as it was aided by the diminution of the atmospheric pressure on the top of the valve, consequent upon the issuing of a portion of the steam in an upward direction around the periphery of the valve, the annular chamber into which the steam is discharged on leaving the valve serving no other purpose than that of a conduit for the steam, when the valve is constructed in accordance with the drawings of the original patent. In the Richardson valve, when the valve opens the steam expands and flows into the annular space around the ground-joint, its free escape is prevented by a stricture or narrow space formed by the outer edge of the lip and the valve-seat. Thus the steam escaping from the valve is made to act by its expansive force upon an additional area outside of the valve proper, to assist in raising the valve; this stricture being enlarged as the valve is considerably lifted from its seat, and varying in size as the quantity varies of the issuing steam. There would be no such variable stricture in the Naylor valve."

This case went to the supreme court of the United States, and in its opinion affirming the case the court says:

"Taken as a whole, the facts show conclusively that the assignor of the complainant [Naylor] was not the first person to devise means for using the recoil action of steam to assist in lifting the seat of the steam-valve for the purpose described, and it follows that the patentee in suit must be limited to what he actually invented, which is the devices, shown in the specifications and drawings, to enable the party to avail himself of such recoil action.

\* \* \* \* \*

"Coming to the specification that describes the steam-valve used by the respondents [Richardson's] it will at once be seen that its construction and mode of operation is substantially different in important particulars, as follows: When the valve opens, the steam expands and flows into the annular space around the ground-joint. Its free escape, which might otherwise be too free, is prevented by a stricture or narrow space formed by the outer edge of the lip and the valve-seat. By these means the steam escaping from the valve is made to act, by its expansive force, upon an additional area outside of the de-

vice, as ordinarily constructed, to assist in raising the valve, the stricture being enlarged as the valve is lifted from its seat, and varying in size as the quantity of the issuing steam increases or diminishes. Important functions, not very dissimilar in the effect produced, are performed by the two patented valves in controversy; but the means shown in the respective specifications, and the mode of operation described to produce the effect, are substantially different in material respects, which shows to a demonstration that the complainant cannot prevail unless it can be held that his assignor invented the overhanging, downward-curved lip, and that he was the first to use an annular chamber, surrounding the valve-seat, into which a portion of the steam is deflected as it issues between the valve and its seat. Neither of those conditions can be found in favor of the complainant, and of course it cannot be held that the respondents have infringed his patent."

These patents were again before Judge LOWELL, of the eastern district of Massachusetts, in a case where the present complainant sued the Crosby Valve Company for infringement, the opinion on the final hearing of the case having been delivered in April, 1881, and is made a part of the record in this case. In that opinion\* Judge LOWELL says:

"In this record the defendant introduces two English patents not brought out in *Richardson v. Ashcroft*, and I have examined two accomplished experts in relation to them. They also produce the American reissued patent of Waterman, which I suppose to have been before Judge SHEPLY in connection with the state of the art, but which, if we may judge from the pleadings, was not relied on to defeat the novelty of the Richardson patent. The original patent of Waterman, which was considerably older than Richardson's, while claiming an improvement to a different part of the valve, showed a structure so much like Richardson's that Richardson sought out the inventor, and they made a joint stock of their two patents, and procured a reissue of that of Waterman, in which he specifies a mode of construction by which, when the valve is raised from its seat, the escaping steam is so directed as to enter an overhanging or projecting annular chamber on the top or upper part of the valve, and outside of and beyond the ground-joint. He describes how this force may be modified by a modification of the overhanging or projecting annular surface. He goes into all the details of the necessary and proper construction, and, in short, as I understand it, describes the Richardson valve, with a stricture and all, excepting that his additional lift was due wholly to the expansive power of the steam admitted to the annular chamber, while Richardson's used both the impact of the issuing steam and its subsequent expansive power. Naylor had used the impact only. \* \* \* My opinion upon the issue of infringement makes it unnecessary for me to explain at large the conclusions concerning the state of the art—at which I have arrived after a patient study of the record—excepting to this extent: I consider it to be fully proved that some valves had been made before 1866 which operated on the same general principle with that of Richardson, and were of some value. Especially is this true of

\*7 FED. REP. 768.

the Naylor and Waterman contrivances, and probably of Beyer's. \* \* \* In this state of the art, Richardson describes an annular chamber outside the ground-joint of a valve, and so regulated by the crack or opening between its lip and the main body of the valve that it will confine or "huddle," as the experts say, the steam when it begins to escape from the chamber, and will presently afterwards open more widely and let the steam escape, and not interfere with the rapid fall of the valve before it has lost too much steam."

The learned judge then particularly describes the Crosby device, the peculiarity of which is that, when the valve rises, an additional part of its under surface is exposed to the action of the steam in the chamber, this additional part is either masked or neutralized until the valve begins to rise, when it furnishes an additional lift proportioned to the additional area exposed, and concludes as follows:

"Now, it is plain that this contrivance does not come strictly within the language of the plaintiff's claim of a safety-valve, with the circular or annular lip, etc.

\* \* \* \* \*

"Considering the state of the art as I have found it to be, that Richardson was not the first to invent and apply, more or less well, the principle of the additional area, nor that of the stricture, he could not, whatever the words of his claim, successfully enjoin the use of a valve resembling his own only in its adoption of these general ideas."

The result of these judicial constructions upon the Richardson device, as I understand them, is to limit the Richardson patent to the special devices therein shown for obtaining a common result. In other words, although Naylor showed an extended area of the valve-head, with a downward-curved lip or flange, thereby producing an annular chamber or recess by which the escaping steam was impeded in its progress to the open air, and an additional lifting force secured for raising the valve, and though Crosby showed an increased area of valve surface upon which the steam began to press as soon as it commenced to escape through the ground-joint, yet neither of these infringe the Richardson patents, because they are not just like Richardson's. They produce the same result, but each by a somewhat different mechanical appliance, and Richardson was not held entitled to invoke the doctrine of equivalents.

The defendant's valve shows an extended area of the valve-head, so as to form a flange and an extension of the valve-seat upwards, so as to form a ring encircling and reaching above the extended valve-head, so that the steam, as it escapes through the ground-joint, impinges upon the flange of the valve-head, and by its impact furnishes an auxiliary lift to aid in raising the valve still higher. The Kunkle

valve shows also a screw-ring attached to the valve-seat, and so arranged as to be movable up and down, thereby controlling, to some extent, the direction of the escaping steam, and causing it to impinge, more or less directly, upon the flange of the valve-head. But in the light of the testimony, and especially of the series of interesting and instructive experiments made by Mr. Hoadly, the defendant's expert witness, with defendant's valve in comparison with the Richardson, Webster, Hartly, and Waterman valves, I fail to find in defendant's valve the stricture which is shown in, and especially provided for, by the Richardson valve. There may be some stricture,—that is, the steam may be, to some extent, huddled and compelled to exert its expansive force on the under side of the extended area of the valve-head, by means of the crooked or angular passages through which it makes its exit to the open air,—but a stricture, as such, was not the invention of Richardson. Mr. Forbes, complainant's expert, finds a stricture in the Webster patent and one in Ritchie's to such an extent that it can readily be converted into the Richardson valve by slightly reducing "the periphery of the supplemental flange;" and Richardson himself, in the Waterman reissue, must be held to have assented to the claim that the Waterman valve shows a stricture, while the Beyer, Hartly, Greene, and Naylor valves also show that the steam in its escape must be, to some extent, impeded and thereby compelled to exert some expansive force upon the supplemental areas of their respective valves; while in Richardson's valve the expansion of the steam in the annular chamber, made by the downward-curved lip, is the chief factor relied upon for an increase of lifting force, and this annular expansion chamber, acting in combination with the stricture or throttled escape passage for the steam from this expansion chamber, is the peculiar feature of Richardson's device.

Webster, it seems to me, shows not only a stricture, but the element of adjustability is clearly shown by the provision for raising or lowering the auxiliary plate or flange upon the spindle of the valve, so as to increase or diminish the opening for the escape of the steam from beneath the extended area of the supplemental flange.

I am certainly unable to find in Kunkle's valve such a stricture as is specially described by Richardson in his patent of 1869. In the specifications of that patent he says:

"The said means so patented, (referring to his patent of 1866,) consisting in forming the valve with a surface outside of the ground-joint for the escaping steam to act against, the said surface being surrounded by a projecting

lip, rim, or flange, leaving a narrow space for the escape of the steam when the valve is open, but which, although of greater diameter than the valve-seat by reason of the said lip, presents a less area of opening for the escape of steam than is produced at the valve-seat, so that the steam which escapes through the area between the valve shall exert pressure between the said surrounding surfaces, and thereby not only open the valve completely, but hold it up until the pressure of the steam in the boiler falls below the pressure by which the valve was opened."

This, as I understand it, is Richardson's definition of the construction and operation of his stricture, and requires in specific terms that the space for the escape of the steam between the flange and ring encircling the expanded valve-head, shall be of less area than the area of escape at the valve-seat; a peculiarity not provided for in Kunkle's valve, and evidently not intended to be a part of his mechanism, as from the time the steam passes through the ground-joint of the Kunkle valve it is nowhere throttled and compelled to pass through a less area on its way to the open air, its exit passages increasing constantly in area instead of diminishing.

With strictures shown in the older stages of the art, I am therefore clearly of opinion that Richardson must be confined to his special mode of producing the stricture; and I am also of opinion that whatever of stricture the defendants show is more nearly, in the mechanical mode of producing it and in its operation, like the older devices of Beyer, Hartly, Webster, Greene, Waterman, and Naylor.

It is true, the defendant uses a screw-ring in his valve, and that Richardson, in his patent of 1869, shows a screw-ring; but the screw-ring shown in the defendant's device is not, in its function nor relation to the operation of the defendant's patent, the same as the screw-ring of the complainant's device of 1869. The complainant's screw-ring was intended specifically to operate as a stricture, or to regulate the size of the opening for the escape of the steam,—a duty which is not performed by the defendant's ring.

The claim of Richardson in the patent of 1869 is "for a combination of the surface, beyond the seat of the safety-valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described."

The specifications describe minutely the means for regulating or adjusting "the area of the passage for the escape of the steam," to be by the operation of a screw-ring, in connection with a central aperture and the disk, F. Here was a peculiar method of throttling or holding the steam so as to make its expansive force available as an

auxiliary to help lift the valve, and the claim covers only that special combination. A new outlet for the steam, inside of the outlet between the expanded head of the valve and its extended seat, is provided in Richardson's later patent, and his claim must be held to cover only that peculiar mechanism by which the new outlet is provided for, and its function determined in combination with the other parts of his device; otherwise the new patent of 1869 would be for the same stricture shown and claimed in the patent of 1866.

After Webster had taught the world how to regulate the escape of the steam by his movable plate upon a spindle on the valve-head, and to hold it at the proper point of adjustment by the set-screw, Kunkle was, it seems to me, at liberty to regulate the opening for the escape of the steam by means of a screw-ring upon the periphery of the valve-seator, by placing such a ring upon the extended valve-head, if he saw fit to do so. The idea of so regulating even the size of the stricture by a movable plate is older than Richardson's invention, and was public property when his invention was made.

I will add that, from the experiments made by the experts in this case, as shown in the proof, it seems quite probable to me that the improved practical working results obtained by the Richardson and Kunkle valves over those previously in use, is as much attributable to their improved finish and mechanical perfection as to any newly-invented element they contain. In the hands of a skillful manipulator, valves constructed according to the specifications of the Webster and Hartly patents, including the proportions given in those patents, did their work substantially as well as the Richardson and Kunkle valve.

The Webster, Hartly, and Waterman valves, when mechanically well made, showed results closely approximating to the best results of Richardson's device. It was long after the steam-engine was a complete conception in the mind of Watt, before skilled workmen were trained by experience, and in the use of suitable tools, to make it accomplish what he intended and theoretically knew it was capable of doing. So these old English and American valves, intended to work on substantially the same principle as Richardson's, may have failed for lack of skill in making and using them, rather than because their inventors had not conceived the true principle upon which they were to work.

The bill must be dismissed, because I find under the proof the defendant does not infringe the plaintiff's patent.

## N. Y. PHARMICAL ASS'N v. TILDEN and others.

*(Circuit Court, S. D. New York. December 3, 1882.)*

## 1. PATENTS FOR INVENTIONS—FAILURE TO MARK ARTICLES AS PATENTED.

Section 4960, Rev. St., declares that when any patented article is not so stamped, "in any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice to make, use, or vend the article so patented."

## 2. SAME—OWNERSHIP—SUFFICIENT NOTICE OF.

A verbal notice by one owning a patent medical compound, to one infringing thereupon, that the compound is patented, and at the same time exhibiting a copy of the letters patent, was *held* to be sufficient notice under the statute requiring patentees to give "sufficient notice to the public, together with the day and year the patent was granted."

## 3. SAME—ASSIGNMENT OF PATENTS—PROOF OF.

Under the statute of New York an assignment of a patent, duly acknowledged before a notary public, is sufficiently proved, and it is not incumbent upon the complainant, in an action for infringement, to prove the signature of the assignor.

*James A. Whitney*, for complainant.

*Francis Forbes*, for defendant.

WALLACE, C. J. Assuming, as must be done upon the proofs, that the complainant is entitled to the most liberal construction of the claim of its patent consistent with the language of the specifications, the claim is to be construed as one for a medical compound composed of the several ingredients combined in such proportions as to effectually co-operate in producing the desired effect. Upon this construction, reading the formula of the defendant's compound with the assistance of their trade circular, which sets forth the properties of their ingredients and the virtues of their preparation, it sufficiently appears that there is a substantial identity between their compound and that described in the complainant's patent to establish infringement. The ingredients are the same, they are combined to produce the same result upon the same principle, and, although the proportions vary, the variation is slight.

The complainant did not mark its preparation as patented, and the defendants insist upon this fact in their answer as a defense. It appears, however, that complainant gave verbal notice to the defendants in January, 1880, that its compound was patented, and exhibited to them a copy of the letters patent, and notified defendants that their compound was an infringement. The statute (section 4900, Rev. St.) declares that, when the patented article is not thus stamped, "in any



suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement and continued after such notice to make, use, or vend the article so patented." It was held in *Good-year v. Allyn*, 6 Blatchf. 33, that this statute only takes away the right of a plaintiff to recover damages, and does not affect the right to an injunction. It was also intimated in that case as doubtful whether the statute applied at all to actions in equity, as no damages were then recoverable except in suits at law. The provision was re-enacted, however, and embodied in the revision and amendment of the statutes relating to patents of July 8, 1870. By that legislation, also, power was conferred upon the court in suits in equity to decree for damages as well as profits. The provision is therefore to be read as a part of the comprehensive legislation designed to cover the whole subject of the rights and remedies of inventors, and as applicable to all suits in which damages are recoverable.

The question whether the notice contemplated by the statute is a written notice, or whether a verbal notice is sufficient, seems to be a new one. Although there is not entire concurrence in the authorities, the rule may be deemed sanctioned by the adjudications that when a statute requires a notice to be given a written notice is meant; and without doubt this is the rule where the notice required is one to be given in the course of a legal proceeding. The statute here requires proof that the defendant "was duly notified \* \* \* and continued after such notice to make, use, or vend the patented article" and therein differs from the statutes which have been the subject of judicial construction. Thus, in *Gilbert v. Columbia Turnpike Co.* 3 Johns. Cas. 107, the statute directed the notice "to be left" at the dwelling-house of the party.

In *Jenkins v. Wild*, 14 Wend. 539, a distinction was taken between a statute which required an appeal to be brought within 15 days "after notice" of an order, and a cognate statute which required "notice to be given," the last being held to mean a written notice. Not only does this statute not require in terms "notice to be given," but it also does not relate to a notice in the course of a legal proceeding. It is designed to protect innocent parties who are infringing without knowledge of the fact, and in this behalf to restrict the remedy of patentees who have failed to give that publicity to their exclusive title which the policy of the statute requires. Patentees are, therefore, required to give "sufficient notice to the public" that the article is patented, \* \* \* "together with the day and year the patent was

granted," by stamping or labeling the article. It is a fair interpretation to hold that when any equivalent notice has been given, the defendant has been "duly notified." As the sufficient notice prescribed includes a specification of the time when the patent was granted, it is reasonable to conclude that any notice, verbal or written, that includes this information will suffice.

Under the statute of this state, the assignments of the patent, duly acknowledged before a notary, were sufficiently proved, and it was not incumbent upon the complainant to prove the signatures of the assignors. *Houghton v. Jones*, 1 Wall. 702.

There will be a decree for the complainant for an injunction, and accounting for profits and for damages; the damages to be restricted to those accruing after February 1, 1880.

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THORSON and others v. PETERSON and others.

(Circuit Court, N. D. Illinois. January 6, 1883.)

SEAMEN'S WAGES—VOYAGE BROKEN UP.

Where seamen shipped for a round trip, and by reason of a collision with another vessel the voyage was broken up, but they were induced by the master to proceed with the schooner to the port of delivery, and on arriving at the port of delivery they refused to aid in discharging the vessel, and claiming their discharge, which was denied by the master, they left and returned to the port of departure, *held*, that the vessel having been laid up at a distant port for the winter, and unable to complete the voyage till spring, that the seamen were entitled to their discharge without completing the round trip, and to compensation for services actually rendered, based upon the principles of a *quantum meruit*.

*Mr. Condon*, for libelants.

*Mr. Kremer*, for defendants.

DRUMMOND, C. J. This was a libel filed in the district court to recover of the owners of the schooner Winnie Wing compensation for services rendered by one of the libelants, as mate, and the other as seaman, on board of the schooner. The libelants shipped on the schooner for a round trip from Chicago to Pentwater, Michigan, and back to Chicago in November, 1880. The seaman was to receive \$20 for the round trip, but the mate, as the preponderance of the evidence shows, was to be paid by the day. The district court found there was due from the defendants to the mate the sum of \$82.75, and to the seaman the sum of \$58.50, for which a decree

was rendered, and from which the defendants appealed to this court. The libelants shipped on the thirteenth of November, on which day the schooner left Chicago, but on the following day a collision took place between the schooner and another vessel, by which the schooner was dismasted and rendered helpless, but after some days on the lake was towed into South Haven. The seaman then requested a discharge from the captain of the schooner on the ground that the voyage was broken up. The captain, however, declined to discharge him, and finally agreed, if he would proceed to Pentwater, he would do what was right by him, and accordingly the seaman, as well as the mate, did proceed to that point. They then claimed that they were entitled to their release without helping to discharge the vessel, and, as the voyage had been broken up, that they both had a right to so much a day for their services rendered, and the seaman claimed, and the captain yielded to the claim, that he was entitled to the amount of expense necessary to return to Chicago. The captain offered to pay both the mate and the seaman on the assumption that an agreement had been made for so much for the round trip, and he insisted that they should remain and aid in the discharge of the cargo. They, however, left the vessel, and the question is whether the defense is made out which claims they have forfeited all compensation for services rendered because of the facts stated. The round trip was not made; the schooner was disabled and could not make it, and remained at Pentwater during the winter.

It could hardly be expected, I think, that the libelants, in order to complete the contract as claimed by the schooner, should remain until the schooner had made the round trip in the following spring. It seems clear, under the circumstances, that so far as the round trip was concerned, at any rate, the voyage was broken up on both grounds: in the first place, because the schooner was dismasted and thereby became incapable of making the round trip; and in the second place, the schooner was obliged to remain at Pentwater during the winter. Under these circumstances, the question is whether the libelants were not entitled to a reasonable per diem compensation for the time during which they rendered service. I think they were. The contract implied between the captain and the seamen at South Haven, in consequence of which the latter proceeded to Pentwater on the schooner, was one independent entirely of that which was made at Chicago. It may be true that the collision was not the fault of the schooner, and there is certainly nothing to indicate that it was the

fault of the libelants, and considering all the facts in the case it seems to me not unreasonable to require the defendants to pay the amount which was decreed by the district court. The services were actually performed. The proof seems to indicate that the seaman, at any rate, was willing to release the schooner from the contract at South Haven, and I hardly think that the facts of the case warranted the defendants in taking an appeal from the decree of the district court. That decree is therefore affirmed.

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### THE NANCY DELL. (Two Cases.)

(District Court, N. D. Illinois. November 6, 1882.)

#### 1. VESSELS—OWNERSHIP—EVIDENCE OF.

The certificate of enrollment of a vessel is of itself not even *prima facie* evidence of ownership.

#### 2. SAME—INNOCENT PURCHASER—DILIGENCE.

Where a party purchases an interest in a vessel merely on the representation of the seller that he was the owner of such interest, and knowing at the time that such seller was not in possession nor exercising acts of ownership over the vessel, and neglected to ascertain from known part owners of the vessel whether the seller's claim as part owner was *bona fide*, he is not an innocent purchaser without notice, nor can he claim that he exercised even ordinary diligence in the matter of said purchase.

#### In Admiralty.

These cases having been referred by said court to LAWRENCE PROUDFOOT, Esq., United States commissioner, to take proofs, examine into and report his conclusions as to the law and the facts therein, he reported in substance as follows:

Amelia Beckley and Theodore S. Consaul, each claiming a one-quarter ownership in said schooner, becoming dissatisfied with the manner in which she was being managed, file a petition for a sale and a partition, alleging a one-quarter ownership in said Amelia Beckley, and that said Consaul is the owner of another quarter, and that one Barney Van Patten is the owner of the remaining half. Under said petition an order of sale is entered, and under a sale by the United States marshal the sum of \$2,100 is realized, which sum is deposited in court. Nancy L. Van Patten, the wife of Barney, files her petition against the proceeds of such sale, alleging that said schooner is indebted to her in the sum of \$2,300, for money loaned, with interest at 8 per cent., which sum is secured to be paid to her

by a mortgage, executed by said Barney Van Patten, conveying to her a three-quarter interest in said schooner as security for the payment of said principal sum and interest.

There is no question raised as to Mrs. Beckley being the owner of a one-quarter interest, but Barney Van Patten claims that he is the owner of the remaining three-quarters, covered by the mortgage executed by him in favor of his wife, and that Consaul has no interest in said schooner whatever, and is therefore not entitled to be paid one-quarter of the proceeds of her sale.

The evidence shows that said schooner was duly enrolled and licensed, and a certificate of such enrollment issued by the collector of customs at Grand Haven, Michigan, April 8, 1879, setting forth that one Edward Anderson had sworn that he owned one-quarter, and that Barney Van Patten owned three-quarters of said schooner, and that he (Anderson) was then master.

During the summer of 1879 Van Patten sold a one-quarter interest to Amelia Beckley, and a new certificate of enrollment was issued at Grand Haven, November 19, 1879, upon the oath of Edward Anderson that he owned one-quarter, Barney Van Patten one-half, and Amelia Beckley one-quarter, and that Charles M. Causland was then master. Subsequently, on March 22, 1880, upon the oath of Mrs. Beckley that she owned one-quarter, Barney Van Patten one-half, and Edward Anderson one-quarter, and that J. G. Beckley was then master, another certificate of enrollment was issued at Grand Haven. On the tenth of May, 1880, upon the oath of Mrs. Beckley that she owned one-quarter, Barney Van Patten one-half, and T. S. Consaul one-quarter, and that J. G. Beckley was then master, a certificate of enrollment was issued at the port of Milwaukee. On the eighth of June, 1881, upon the oath of Barney Van Patten that he owned one-half, Amelia Beckley one-quarter, and that T. S. Consaul, according to the record, owned one-quarter, which one-quarter he (Van Patten) claims to own, and that Peter Peterson was then master, another certificate of enrollment was issued at Grand Haven.

The evidence of Mrs. Beckley convinces me that she knew nothing of her own knowledge in regard to any ownership of Anderson, but made the oath for enrollment from the previous enrollment made by Anderson, in which he alleged that he was a one-fourth owner. On the twenty-third of March, 1880, a bill of sale was made by Edward Anderson of one-quarter interest in said vessel to Theodore S. Consaul for the sum of \$650. Consaul claims that he bought said quarter in good faith, and that before buying it he telegraphed to the custom-

house at Grand Haven to ascertain who were the enrolled owners of the said schooner at that time. An answer by telegram, signed by Deputy Collector Stephenson, was received by Consaul, as follows: "Edward Anderson fourth, Barney Van Patten half, and Amelia Beckley fourth. No incumbrances." On the strength of this telegram, and without making any inquiries of the other owners, Consaul bought for the nominal sum of \$650. The evidence shows that the actual amount paid was \$400, \$150 of which was paid to Mr. Anderson at the time, and \$250 were deposited in bank to secure Consaul against any claims that might be brought against the vessel, and subsequently this \$250 was paid over to Anderson. During the time it lay in the bank, however, the evidence shows that Barney Van Patten told Mr. Consaul that Anderson had no title to sell; that he never had owned an interest in the boat, and advised him to be careful in dealing with him.

Barney Van Patten testifies that Anderson never had any interest whatever in the schooner; that he was employed by him to build her, and that all the money that went into her was advanced by him, (Barney Van Patten,) and that Anderson was paid for his services by days' labor, etc.; and that he employed him as master, and that as such master he took advantage of him (Van Patten) and took out first enrollment papers, representing that he (Anderson) was one-quarter owner of her, when in fact he had no ownership whatever, and that it was a fraud upon him, (Van Patten.)

Anderson is not put upon the stand to contradict this statement, and the other evidence introduced in the case convinces me that Van Patten's statement is correct, and that Anderson never did own an interest in said vessel.

The question, therefore, is, can Barney Van Patten, the real owner of this quarter interest, under the circumstances of this purchase by Consaul, be held liable in any manner to him (Consaul) as an innocent *bona fide* purchaser for value. The sole evidence introduced by Consaul to support his title, is a copy of these different certificates of enrollment, and he claims that such certificates justify the conclusion arrived at by him that Anderson was an owner of the one-quarter interest, as stated in said enrollment papers.

On the law relating to such matters I find as follows:

"The certificate of enrollment of vessels on the northern frontier, necessarily engaged in both foreign and domestic commerce, is equivalent to both a registry and an enrollment; an enrollment made on the oath of the master alone is void." Desty, Shipp. & Adm. § 22, and authorities there quoted.

"An enrollment is not conclusive nor *prima facie* evidence of ownership, nor of the party named therein as being master." Desty, Shipp. & Adm. § 24, and authorities quoted; 1 Pars. Shipp. & Adm. §§ 47, 48, 49.

"The real owner may prove by parol evidence that the register and enrollment have been fraudulently made, and issued in the name of another." Desty, Shipp. & Adm. § 30, and authorities quoted.

"Independently of the registry act, ownership may be at least *prima facie* established by evidence of possession under claim of title or other matter *in pais*, as in the case of any other chattel." Desty, Shipp. & Adm. § 60, and authorities quoted.

"The register is not a public document or record, but a private instrument, and the mere declaration of the party making it." 1 Pars. Shipp. & Adm. §§ 41, 42, 43, and authorities quoted.

"Of itself the registry is not evidence of property unless it be confirmed by some auxiliary circumstances, to show that it was made by the authority of the persons named in it, who are sought to be charged as owners." *Bas v. Steele*, 3 Wash. C. C. 381.

"If one claims to prove his title by the fact that his ownership appears on the register, it may be answered that *he caused it to be there by his own act, and cannot in this way make evidence for himself*. On the other hand, if he wishes to prove his interest when his name is not there, or if another wishes to charge him as owner by proof outside of the register, which does not show him to be an owner, it may be said that *registration is no necessary incident to ownership*, and therefore the want of registration, or of any name in the register, justifies no conclusion against the ownership." 1 Pars. Shipp. & Adm. §§ 41, 42, and authorities quoted.

"In controversies between owners of a vessel involving a question of title, merely the enrollment is not even *prima facie* evidence. When offered to show title or proprietorship in the person making it, it is wholly inadmissible as evidence, for the reason that it is proof only of *his acts*, and cannot be received against other parties." *The Superior*, Newb. 181.

"Possession and assertion of ownership and notoriety are stronger evidence of property in a ship than registry without possession." 3 Wash. C. C. 390.

It is a well-settled rule of law that if a party sells property, having no right or title to it, the purchaser, though a *bona fide* purchaser, and for a valuable consideration, acquires no title, and the purchaser's title, depending upon the purchase by him in good faith and for valuable consideration, is still without foundation, so long as the seller has neither title nor authority to sell, and the true owner has a right to reclaim his property, and to hold any one responsible who has assumed the right to dispose of it.

The law in regard to ownership of vessels and sales of interest, etc., being as above set forth, and the claimant Consaul having purchased this interest merely on the representation of Anderson that he was owner of it, knowing at the time that Anderson was not in pos-

session and exercising no acts of ownership, and neglecting to ascertain from those who are in possession, and whom he knew were at least part owners of said vessel, whether or not Anderson's claim as part owner was *bona fide*, and after the purchase by him, although told by Mr. Van Patten that he (Consaul) had been defrauded by Anderson, and that he (Anderson) never had owned an interest in the vessel, and, in the face of such information, allowing the purchase money (which then lay in the bank) to be paid over to Anderson, (see uncontradicted testimony of Van Patten,) he cannot claim that he was an innocent purchaser without notice, nor can he claim that he exercised even ordinary diligence in the matter of said purchase.

There is no question that the real owner, Barney Van Patten, was not in any way in fault; the property was sold without his consent or knowledge, and the purchaser must therefore look to the seller for indemnity.

I therefore find, and herewith report, that the claimant Barney Van Patten is the legal owner of the said one-fourth part of said schooner, which said fourth part is covered by the mortgage to Mrs. Nancy L. Van Patten, his wife, and after the payment of all costs incurred in this matter, which may be applied to the value as per sale of the one-quarter interest in the said Nancy Dell, the balance, if any, to be applied and paid over on account of the mortgage of Nancy L. Van Patten, and that the libel of Amelia Beckley and others be dismissed with costs, and that a decree be entered accordingly.

All of which is respectfully submitted.

LAWRENCE PROUDFOOT,

United States Commissioner, Northern District of Illinois.

W. H. Condon, for libelants.

Schuyler & Kremer, for respondents.

Upon exceptions filed to this report of the commissioner, the case was argued before and heard by Judge HENRY W. BLODGETT, who, after taking it under advisement, affirmed the report of Mr. PROUDFOOT in every respect, and ordered that a decree be entered in accordance therewith.



## THE JOHN H. PEARSON.\*

FILIBERTO and others v. TAYLOR.

ROLFE and others v. SAME.

*(Circuit Court, D. Massachusetts. December 29, 1882.)***1. SHIPPING—DEVIATION—DAMAGES FOR LOSS OF CARGO.**

In an action for damages for a deviation on the voyage, where the charter-party stipulated that the captain "engages himself to take the northern passage," a phrase which both parties admitted to be technical, the libelants are bound to show the meaning of the clause which they caused to be put into the charter-party, and its breach.

**2. CHARTER-PARTY—CONSTRUCTION—TECHNICAL PHRASES.**

If a charter-party contains a technical phrase subjecting the master to unusual duties, that phrase must be made clear by evidence; and if there are two constructions, the master may adopt either, without being guilty of a deviation.

**3. SAME—ADMISSIONS OF MASTER.**

The admissions of the master at the end of the voyage as to the meaning of a technical phrase in the charter-party are not conclusive on him or his co-owners upon the merits of the case.

**In Admiralty.**

The bark John H. Pearson was chartered to bring a cargo of oranges and lemons for the libelants from Palermo to Boston. The charter-party contained the words, "Captain engages himself to take the northern passage," inserted at the order of the libelants. The vessel sailed from Palermo January 7, 1881, arrived at Gibraltar February 18th, waited there one day for stores, sailed February 19th, met with severe weather, and reached Boston May 2d. The cargo was very seriously damaged. The course of the vessel from Gibraltar to Boston was a little to the south of the latitude of the Azores, averaging about lat. 36 deg. N., but lay south of this latitude for a few days, the lowest point being 33 deg. 18 min. The libel alleged that the master failed to take the northern passage, and exercised bad judgment in not keeping more to the north. The witnesses on behalf of the libelants testified that the northern passage was understood to be a passage north of the Azores to the "tail" of the Great Banks, and then home, and that the course of the vessel was in what is known as the middle passage. Some of the witnesses on the part of the ship deposed that the northern passage was whatever was not southern; others, that it was anything north of 30 deg. to 35 deg. or 36 deg., varying somewhat with different witnesses. There was no dispute that the southern passage was further south than this vessel went,

\*Reversed. See 7 Sup. Ct. Rep. 1008.

namely, in the region of the trade-winds, which is about 18 deg. to 28 deg. N. There was a cross-libel for freight. The district court dismissed the libel for damage, and decreed for the libelants in the libel for freight.

*H. W. Putnam*, for libelants.

*F. Dodge*, for claimants.

LOWELL, C. J. I have examined the evidence with great care, remembering that my decision of facts is final. The evidence for the libelants tended to prove the importance of cargoes of fruit being kept cool, and that fruit dealers owning ships had been in the habit of instructing their masters to take the northern passage, not, as I understand it, usually, if ever, in those words, but to keep a northerly course, which had come to be considered the northern passage, and that this was north of the Azores, if possible, and if not possible, north of the latitude of the Azores as soon as possible. They said that when ships were chartered, especially within the last eight or ten years, the charter-parties had contained clauses binding the master to take this course. They introduced two charter-parties, C and D, which contained an agreement that after leaving Gibraltar the vessel should go to the northward of the Western Islands, if practicable, and keep north of that latitude unless forced south by stress of weather, in which case the log-book should furnish evidence of the fact. A third, containing an exactly similar clause, was put in by the defendants, on which was indorsed that should adverse winds prevent the vessel from going northward of the Western Islands, the captain might sail south down to latitude 34. These clauses agreed exactly with the definition of the libelants' witnesses, who deposed, besides, that the course taken by this vessel was known as the middle passage.

The witnesses for the ship, consisting of ship-masters and ship-brokers, said that the northern passage was anything which was not southern, or that it was any passage above 30 deg. to 35 deg. or 36 deg., varying somewhat. They considered the instructions were given, or inserted in charter-parties, to prevent masters from taking the easy and comfortable passage where the trade-winds prevail. The claimants introduced three charter-parties, E, G, and H, one of which contains the agreement that the master should not go below latitude 34 deg.; another that he should not go south of 32 deg.; and the third established 30 deg. as the southern limit.

The district judge decided that the libelants were bound to show the meaning of the clause which they had caused to be put into the

charter-party, and its breach, and that they had failed to do so. In the conflict of oral testimony he relied a good deal on the charter-parties, one-half of which were favorable to the defendant's views of the subject. It is now argued by the libelants that they are of little value in the discussion; but it seems difficult to overvalue them. Those favorable to the libelants were put in by them for the very purpose of showing what was the northern passage and much of the oral evidence was made up simply of a recollection of similar clauses. The contracts favoring the defendants have precisely as much bearing on the question. They show what latitudes the parties making them considered high enough for safety. The point in dispute was what has come to be, by general consent, the northern or safe passage for fruit, insisted on in contracts and instructions to masters. Those charter-parties confirm very strongly the defendants' contention, that anything north of about 30 deg. was a, or the, northern passage. There is no satisfactory evidence that the words "northern passage" were ever written into any contract before this charter-party was made. When the libelants who testified here instructed their correspondent in Palermo to insert an agreement for the northern passage, they might properly have expected him to define a course for the vessel. If he had done so, who can say whether he would have defined it like C and D, or like E, G, or H?

Again, the libelants argue that the district judge was wrong in requiring them to prove that the contract has the construction which they contend for; citing *Funcheon v. Harvey*, 119 Mass. 469. In that case the master sued for freight under a charter-party, which required him to take on board at St. Johns, Newfoundland, a cargo of fish with all convenient speed, and proceed to Cuba "direct." The fish was spoiled, and there was evidence tending to show delay, deviation, and negligence by the plaintiff. The court held that the burden was on the plaintiff to make out his whole case, including due diligence. No doubt that was a sound decision; but, by parity of reasoning, if the action had been against the master for the damage, the then plaintiffs (defendants in the principal case) would have the burden of proof to show a breach of the contract; and it follows that, if I am to go by burden of proof, I must decide one of these cross-actions one way and the other the opposite way. The burden of proof is of very little importance in most cases, and of almost none in the construction of a written contract, and I do not understand that Judge NELSON relied upon it; what I suppose him to have in-

tended to say, and what I say, is, that if the contract contained a technical phrase, subjecting the master to an unusual duty, that phrase must be made clear by evidence, or else that part of the contract is unintelligible; or, if there are two constructions, the master might safely adopt either, without stopping to inquire whether a few more persons believed it to mean the one than those who thought it to mean the other. In this sense, the burden is on the shippers in both cases.

I have not overlooked the evidence which seems to show that the master admitted to a witness that he had taken the middle passage. From this it has been argued with much force that, whatever may be the meaning of such a contract when made by others, these parties both understood that there is a middle passage distinct from the northern one, and that it is where the libelants say it is. After some hesitation, I have decided that this admission of the master must be taken like any other piece of evidence tending to show the meaning of the technical phrase, and not as concluding him and his co-owners upon the whole merits of the case.

Upon the whole evidence, I am of opinion that there was no technical deviation.

Nor was there such negligence as should require the ship to pay for the loss. There was a day when the master might have turned towards the north when he did turn towards the south; at least I think the preponderance of the evidence is so. But in these matters much discretion must be left to the master, who is on the spot, and who must decide at short notice. No ship could safely take a perishable cargo, if any error of judgment, not amounting to a rash and almost criminal negligence, should render the owners liable to damages.

Decrees affirmed.

GRAHAM *v.* BOSTON, H. & E. R. Co. and others.*(Circuit Court, D. Massachusetts. January 15, 1883.)*

## 1. CONSOLIDATED CORPORATION—DOMICILE.

Where a railroad corporation was made up of four distinct corporations, chartered by the legislatures of different states, and all consolidated and merged into one corporation under the laws of such states, and becomes one of that class of corporations owning a railroad extending through two or more states and chartered under the laws of each state, having a common stock, the same shareholders and officers, the same property, and a single organization, it is for most purposes one corporation. But it is a separate corporation in each state, in so far that it is governed by the laws of each state within its own territory, and is considered to have a domicile in each state, and, in the absence of any statutory provision to the contrary, may hold its meetings and transact its corporate business in either state.

## 2. EQUITY—RELIEF FROM DECREE OBTAINED BY FRAUD.

Where a decree or judgment has been obtained against a party to a suit at law or in equity by fraud or deception practiced upon him by the opposite party, and he has lost, without fault on his part, his remedy of applying to the court for the revocation or reversal of the decree or judgment, a court of equity will afford him relief.

## 3. SAME—RELIEF, WHEN NOT OBTAINABLE.

A circuit court of the United States cannot revise or set aside a final decree rendered by a state court, which had complete jurisdiction of the parties and subject-matter, upon the ground of fraud in obtaining the decree, where the injured party had an opportunity to apply to the state court to reverse the decree.

## 4. SAME—ADJUDICATION IN BANKRUPTCY—NOT IMPEACHABLE COLLATERALLY.

An adjudication of bankruptcy made by a district court, having jurisdiction of the bankrupt, cannot be impeached collaterally by any person who is a party to the bankruptcy proceedings. Where the plaintiff in a collateral action, and all the shareholders whom he represents, form an integral part of the corporation adjudged to be bankrupt, they are parties to the bankrupt proceedings and are bound by the decree, and cannot impeach it collaterally.

## 5. SAME—REMEDY PROVIDED BY STATUTE—SUPERVISORY JURISDICTION.

The only remedy provided for the correction of errors in such cases is to be found in the supervisory jurisdiction of the circuit court, as given by section 4986 of the Rev. St., upon bill, petition, or other process of any party aggrieved, which jurisdiction is exclusive; and the determination of the case by the circuit court, as in a court of equity, is not reversible in the supreme court.

## 6. LACHES—RELIEF IN EQUITY NOT OBTAINABLE.

Where a bill for relief was brought 14 years after the making of the railroad mortgage, 10 years after the commencement of bankruptcy proceedings against the railroad corporation, 9 years after the entry of the decree of foreclosure of the railroad mortgage, and 7 years after the decree of foreclosure became absolute, and the road was conveyed to the new corporation by trustees lawfully appointed, and during all this time the records of the courts, upon which appear all the proceedings by which the alleged fraud is claimed to have been

consummated, have been open to inspection and examination, and what has been done might have been known to plaintiff if he had made inquiry, a court of equity will not grant relief.

7. JURISDICTION.

Where a suit was instituted by an alien against a corporation, citizen of the state where suit is brought, the jurisdiction of the federal court is not defeated by the mere fact that a shareholder, a citizen of the state, was admitted by the court upon his own application as a co-plaintiff.

In Equity.

*Benj. F. Butler and R. A. Pryor*, for plaintiff.

*W. G. Russell and J. L. Thorndike*, for N. Y. & N. E. R. Co.

*J. C. Gray and W. C. Loring*, for assignees of B., H. & E. R. Co.

*C. M. Reed*, for executrix of Mark Healey.

NELSON, D. J. This is a bill in equity, filed July 8, 1880, by a shareholder in the Boston, Hartford & Erie Railroad Company, in behalf of himself and every shareholder and creditor of the company, to set aside as invalid a mortgage given by the company on its railroad, franchise, and property to Robert H. Berdell, Dudley T. Gregory, and John C. Bancroft Davis, as trustees, to secure the payment of an issue of the bonds of the company to the amount of \$20,000,000. The defendants are the Boston, Hartford & Erie Railroad Company, and its assignees in bankruptcy, the New York & New England Railroad Company, which is at present in possession of and operating the railroad, certain persons now living, and the personal representatives of others now deceased, who have, at different times, acted as trustees under the mortgage, the treasurer and receiver general of the commonwealth of Massachusetts, George Ellis, Frederick A. Lane, and W. C. Eayrs. The case was heard upon separate demurrers to the bill, filed by the New York & New England Railroad Company, by the assignees of the Boston, Hartford & Erie Railroad Company, by Hart & Clark, two of the trustees, and by the executrix of Mark Healey, a deceased trustee. Among the causes of demurrer, assigned by each of these defendants, are want of equity, laches, and want of jurisdiction in the court.

1. The ground upon which the plaintiff asks that the mortgage may be set aside and declared invalid is that it was made and authorized at a meeting of the shareholders held in the city of New York; that the corporation was not a corporation of the state of New York, but a corporation created by the statutes of Connecticut, Massachusetts, and Rhode Island, and the meeting ought to have been held in one or all of said states, and not in the state of New York; and

therefore the meeting was illegal, and all its acts and doings were null and void.

The bill sets forth that in December, 1865, there remained unbuilt of the company's line the portion between Waterbury, in the state of Connecticut, and Fishkill, in the state of New York, a distance of 74 miles, and also a portion in Connecticut between Willimantic and Mechanicsville, a distance of 26 miles, and the company found itself unable with its then means to further complete its road; that on the fourteenth of March, 1866, the company resolved to make a mortgage upon its road and property, and to issue bonds, to be secured by the mortgage, not to exceed the amount of \$20,000,000 in all, for the purpose of retiring a then existing mortgage debt, and prior liens upon its road and property, amounting to \$9,904,650, with accrued interest to that date, and to complete and equip its road.

In the mortgage itself, bearing date March 19, 1866, a copy of which is annexed to the bill, the corporation is described as "a corporation existing under the laws of the states of New York, Connecticut, Rhode Island, and Massachusetts." It is recited that—

"The shareholders of the Boston, Hartford & Erie Railroad Company, at a meeting duly and lawfully called and held at the city of New York, on the fourteenth day of March, A. D. 1866, voted to authorize the directors to make application to the several legislatures of the states in which the chartered rights of the road exist, for authority to make a mortgage upon the whole or any portion of the line of the road, and to create, issue, and dispose of, at the best rates that can be obtained, their convertible bonds, payable in the city of New York, on the first day of July, A. D. 1900, for \$1,000 each, not to exceed the amount of \$20,000,000 in all, with authority to the directors to make a portion of the bonds payable in London;" "interest payable semi-annually on the first days of January and July in each year, at the rate of 7 per cent. per annum; interest and principal to be payable at such places in the city of New York and in London as the directors may authorize; and the particular form of bonds, interest, warrants thereon, and mortgage to be left entirely at the discretion of the board of directors; the said bonds to be issued for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road;" "that the board of directors, at a meeting duly convened and held in the city of New York on the nineteenth day of March, 1866, voted to authorize the creation and issue of the first-mortgage bonds of said company, in the following form," (a form of the bond is here inserted;) and that "the said directors, at their said meeting, further voted to empower bonds of said form \* \* \* hereafter to be issued, and to be secured under the mortgage, \* \* \* but not in a greater principal sum than \$20,000,000 in all; \* \* \* and further, at the same time, voted to secure the entire issue of said bonds by the execution of a mortgage in the form of these presents."

It then proceeds to convey to the trustees named the railroad of the company, commencing at the foot of Summer street, in Boston, and thence extending through the states of Massachusetts, Connecticut, Rhode Island, and New York to the western terminus of its location on the east bank of the Hudson river at Fishkill, together with all the privileges, franchises, and property then owned, or thereafter to be acquired, by the company.

By acts of the legislatures of Rhode Island, Massachusetts, Connecticut, and New York, passed soon after the date of the mortgage, the proceedings of the company in its execution were expressly ratified and confirmed, the same language being used in all the acts, as follows: "The proceedings of the Boston, Hartford & Erie Railroad Company, whereby, by indenture dated March 19, 1866, they conveyed their railroad and property in mortgage to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees of bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed."

The bill further set forth that the Boston, Hartford & Erie Railroad Company was originally chartered by the legislature of Connecticut, by an act passed at its May session in 1863, and that subsequently acts were passed by the legislatures of Massachusetts and Rhode Island, making the company a corporation of those states also; that in August, 1863, the Southern Midland Railroad Company, having previously acquired all the franchises and property of the Boston & New York Central Railroad Company, a corporation chartered under the laws of Massachusetts, Connecticut, and New York, conveyed all its franchises to the Boston, Hartford & Erie Railroad Company; and that in November, 1863, the company, under authority given by the legislatures of all the four states, acquired the franchises of the Hartford, Providence & Fishkill Railroad Company, a corporation chartered under the laws of New York, Rhode Island, and Connecticut.

It further appears that under an act of the legislature of New York, passed April 25, 1864, entitled "An act to consolidate the Boston, Hartford & Erie, the Boston, Hartford & Erie Extension, and the Erie Ferry Extension Railroad Companies," (the two latter being New York corporations,) the Boston, Hartford & Erie Railroad Company acquired the rights of charter and property of both the New York corporations, with the authority to have, hold, and use the same in its own name and right as a portion of its railway line and property, and all the rights which the corporations had to con-



struct and operate a railway within the terminal points designated in their charters, subject to the laws of the state concerning railroad corporations.

It thus appears that the corporation was made up of several distinct corporations, chartered by the legislatures of the different states, and all consolidated and merged into one corporation under the laws of all the states. It therefore became one of that class of corporations, so numerous in this country, owning a railroad extending through two or more states, and chartered under the laws of each state. In such cases the corporation has a common stock, the same shareholders and officers, the same property, and a single organization, and is, for most purposes, one corporation. But it is a separate corporation in each state, so far that it is governed by the laws of each state within its own territory. Such a corporation is considered to have a domicile in each state, and, in the absence of any statutory provision to the contrary, may hold its meetings and transact its corporate business in each. *Bridge Co. v. Meyer*, 31 Ohio St. 317; *Pierce*, Railr 20.

To show that this was not a New York corporation, the plaintiff relies upon *Railroad Co. v. Harris*, 12 Wall. 65. In that case it was decided that the Baltimore & Ohio Railroad Company, a Maryland corporation, having obtained from the legislature of Virginia an act authorizing it to construct a railroad in that state, did not thereby become a Virginia corporation, the court holding that a Virginia statute, under its peculiar terms, did not create a new corporation, but was a mere enabling act to permit the Maryland corporation to do business in Virginia. See, also, *Railroad Co. v. Koontz*, 104 U. S. 5. But the New York statutes concerning this corporation are of quite a different character. They are not mere enabling acts, granting to a foreign corporation permission to transact its business within the state. They constitute it a New York corporation to the same extent as the legislation of Massachusetts, Connecticut, and Rhode Island make it a corporation in those states. If it is not a New York corporation, it is not one in the other states, and has no domicile, and upon the plaintiff's theory of the law could not hold a meeting of its shareholders in either state, or, for that matter, anywhere else. It is clear that a meeting of the stockholders, at which the mortgage was authorized, was lawfully held in New York, and that its proceedings were valid and binding on the company. To this it may be added that the confirmatory acts passed by the legislatures of the four states at the request of the shareholders, and acquiesced in for 14

years, would of themselves have been sufficient to cure the defect if it had existed. *Shaw v. Norfolk R. Co.* 5 Gray, 162; *Howe v. Freeman*, 14 Gray, 566. It is by no means clear, if the company had not been a New York corporation, and no confirmatory acts had been passed, that the proceedings of the meeting in New York would have been absolutely void; and it is still more questionable whether, after negotiating this loan upon the faith of a mortgage, which contained a recital that it was a New York corporation, either the corporation itself or its shareholders should be permitted to take advantage of the irregularity. But the conclusion already reached renders it unnecessary to consider these questions.

2. The bill further prays that if the court shall not, for the causes stated in the bill, declare the mortgage invalid, then, in the alternative, that the trusts under the mortgage may be established and confirmed, that the present trustees may be removed and new trustees be appointed to take possession of the mortgaged property, and hold it under the direction of the court for the benefit of the shareholders and creditors; and that an account may be taken of the earnings of the road. The mortgage contained provisions that in case of default by the company in the payment of either principal or interest of the mortgage bonds, the company should deliver possession of the mortgaged premises to the trustees, and that on taking possession, the trustees should file in the office of the secretaries of state of Massachusetts, Rhode Island, Connecticut, and New York, a written notice that they had taken possession for default in the payment of the principal, or interest, or both, as the same may be, and of their purpose to foreclose the mortgage for the default; that if the default should continue for the space of 18 months after such notice filed, the mortgaged premises should vest absolutely and in fee in the trustees, and the right of redemption of the company therein should be forever barred and foreclosed; that in case of an absolute foreclosure, it should become the duty of the trustees to call a meeting of the bondholders, by an advertisement of the time, place, and the object thereof, in newspapers published in Boston, Providence, Hartford, New York, and London, at which meeting the bondholders might organize themselves into a corporation under such corporate name as they might select, with a capital stock equal to the outstanding mortgage bonds; which new corporation should have all the powers, privileges, and franchises, and be subject to all the duties, liabilities, and restrictions, of the old company; and the trustees should thereupon convey to the new corporation all the mortgaged property and fran-

chises. The mortgage also contained provisions for the filling of vacancies in case of the death, resignation, or removal of any of the trustees, and for the vesting in the persons so appointed all the mortgaged property. The following facts appear from the bill, and a record of the supreme judicial court of Massachusetts for Suffolk county, a copy of which is made part of the bill:

On the fifteenth of July, 1870, George Ellis and others filed their bill of complaint in that court, sitting in equity, in behalf of themselves and all other holders of the mortgage bonds, representing that they were the owners of 47 of the bonds, and of the interest warrants thereon, which had matured on the first days of January and July of that year, and were unpaid; and praying for the appointment of a receiver and for the foreclosure of the mortgage. On the second of August, 1870, an order was entered in the cause, appointing receivers, and directing them to take possession of the road and property. On the ninth of May, 1871, a decree was entered in the cause, in which, after reciting that the court on the twenty-fourth of April, 1871, had decided and decreed that Moses Kimball, Thomas Talbot, and Avery Plumer were, in law, the present trustees under the mortgage, it was adjudged and decreed by the court that the receivers deliver into the possession and control of these trustees, or their successors in office, all the roads, railways, property and franchises which they had in their hands and possession, or under their management and control as such receivers; that the trustees or their successors in office, upon taking possession of the property, should file in the offices of the secretaries of state of the four states the notices authorized by the mortgage; and if default in the performance of the condition of the mortgage should continue for the space of 18 months after the filing of such notices, the mortgaged property and franchises should vest absolutely and in fee in the trustees and their successors, and all right or equity of redemption of the company therein should be forever barred and foreclosed.

By a decree entered July 28, 1871, William T. Hart, George T. Oliphant, and Charles P. Clark were appointed by the court trustees in place of Kimball, Talbot, and Plumer, who had resigned, and were declared their successors in the trust. Under these decrees the trustees entered into possession of the mortgaged property, and on the sixteenth of September, 1871, filed in the offices of the secretaries of state of the four states the notices of foreclosure, and, the default still continuing, maintained their possession for a period of more than 18 months thereafter. On the eighteenth of March, 1873, they called a meeting of the bondholders, as authorized in the mortgage, for the purpose of organizing themselves into a corporation. At this meeting, held in Boston on the seventeenth of April, 1873, a corporation was formed under the name of the New York & New England Railroad Company. By acts of the legislatures of the several states, passed in May, 1873, the proceedings of the meeting were ratified and confirmed, and the new corporation has since been in possession of the road and franchises under a conveyance from the trustees authorized by these statutes. The bill contains an averment that the Ellis suit has never proceeded to a final determination and decree, and is still pending in court.

The case thus presented shows that prior to the filing of this bill, under a decree of a court of equity having jurisdiction of the parties and of the subject-matter, the mortgage had been completely foreclosed. To avoid the effect of the foreclosure, the bill charges that the Ellis suit was the result of a fraudulent conspiracy on the part of Ellis, the plaintiff, Lane, the president of the company, who represented it in its defense, and the receivers and trustees appointed by the court, entered into for the purpose of embarrassing the company and depriving it of its road and property; and that this fraud was perpetrated by submitting to the court false statements of facts for its decision, and thus obtaining a decree against the company. The bill does not allege in what particulars the statements of fact were false, nor does it allege that there was not a breach of the condition of the mortgage, nor that the plaintiffs were not the actual holders of the bonds and unpaid interest warrants, nor that any part of the interest which has accrued since 1869 has ever been paid, nor is there any offer or suggestion for redeeming the mortgage. There is no allegation that the new corporation, or any considerable number of the bondholders, had any knowledge of the alleged fraud. The obvious inquiry arises, at this stage of the case, why the plaintiff has not brought to the attention of the state court the fraud alleged to have been practiced upon it, and there sought to have the foreclosure decree revoked. It is well settled in the courts of the United States that when a decree or judgment has been obtained against a party to a suit at law or in equity by fraud or deception practiced upon him by his opponent, and he has lost, without fault of his, his remedy of applying to the court for the revocation or reversal of the decree or judgment, a court of equity will afford him relief. *U. S. v. Throckmorton*, 98 U. S. 611; *Metcalf v. Williams*, 104 U. S. 93.

In *Nougue v. Clapp*, 101 U. S. 551, it was held that the circuit court of the United States cannot revise or set aside a final decree rendered by a state court which had complete jurisdiction of the parties and subject-matter, upon the ground that the decree was obtained by fraud, where the injured party has had an opportunity to apply to the state court to reverse the decree. The plaintiff is a party to the foreclosure suit as a shareholder in the old corporation. The state court is still open to listen to the complaint of the corporation and its shareholders. The decree of foreclosure, though final in one sense, as determining the respective rights of the parties to the property in question, is still in its nature interlocutory, and is open to review by the court upon petition or motion in the cause, or by bill of review,

for good cause shown. Story, Eq. Pl. § 421, and note; *Evans v. Bacon*, 99 Mass. 213; Mass. R. S. c. 151, § 12. The plaintiff has, therefore, an ample and complete remedy for all his alleged grievances in the state court, and there is no occasion for his application to this court for relief by bill in equity. The decree of foreclosure, therefore, now in full force and unrevoked, is a bar to this suit.

3. On the twenty-first of October, 1870, a petition in bankruptcy was filed against the corporation by one Adams, claiming to be a creditor, in the district court of the United States for this district, upon which petition the corporation was adjudicated a bankrupt, and assignees were chosen, who are made defendants in this suit. After their appointment they conveyed to the new corporation all their interest in the mortgaged property. It is manifest that the right to all the relief which is prayed for in this bill passed to the assignees by force of the assignment from the district court, unless the effect of the adjudication in bankruptcy can be avoided upon the ground stated in the bill. This is admitted by the learned counsel for the plaintiff. The allegation is that the proceedings in the district court were fraudulent and collusive, and were a part of the conspiracy of Ellis, Lane, and others, to which the petitioning creditor also became a party, to wreck the road; and that the petitioning creditor's debt was insufficient to give the court jurisdiction.

An adjudication of bankruptcy, made by a district court having jurisdiction of the bankrupt, cannot be impeached collaterally by any person who is a party to the bankruptcy proceedings. Until vacated, in the manner prescribed by the bankrupt act, it is binding upon all the parties to it. The district court is always open for a re-examination of its decrees in an appropriate form. Any order made in the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its revocation. The only remedy provided for the correction of errors in such cases is to be found in the supervisory jurisdiction of the circuit court. By section 4986, Rev. St., the circuit court is given general superintendence and jurisdiction of all cases and questions arising in the district court when sitting in bankruptcy, and, upon bill, petition, or other process of any party aggrieved, may hear and determine the case as in a court of equity. This jurisdiction is exclusive of all other courts, and is not reviewable in the supreme court. *Morgan v. Thornhill*, 11 Wall. 65; *Smith v. Mason*, 14 Wall. 419; *Sandusky v. Nat. Bank*, 23 Wall. 289; *New Lamp Chimney Co. v. Brass & Copper Co.* 91 U. S. 656; *Sanger v.*

*Upton*, 91 U. S. 56; *Milner v. Meek*, 95 U. S. 252; *Sweatt v. Railroad Co.* 3 Cliff. 339.

In *New Lamp Chimney Co. v. Brass & Copper Co.* the court say:

"A decree adjudging a corporation bankrupt is in the nature of a proceeding *in rem* as respects the *status* of the corporation; and, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given."

No such defect appears in these proceedings. The district court had jurisdiction to make the decree, and it has never been vacated. The plaintiff, and all the shareholders whom he represents, form an integral part of the corporation, and as such were parties to the bankruptcy proceedings. He is, therefore, bound by the decree, and cannot impeach it collaterally in this suit.

4. Another defense is laches. This bill was filed fourteen years after the making of the mortgage, ten years after the commencement of the bankruptcy proceedings; nine years after the entry of the foreclosure decree in the *Ellis* suit, and seven years after the foreclosure had become absolute, and the road conveyed to the new corporation by the trustees. During all this time the records of the courts, upon which appear all the proceedings by which the alleged fraud is claimed to have been consummated, have been open to inspection and examination, and what has been done under them might have been known to the plaintiff, if he had seen fit to make inquiry. In the mean time it is apparent that many persons must have acquired rights in the stock of the new corporation, who were ignorant of the alleged frauds. Under such circumstances, to set aside this mortgage, to disregard the decree of foreclosure and the adjudication in bankruptcy, and to take the road out of the hands of the bondholders, who have received no interest on their bonds since 1869, and to place it in the hands of receivers for the benefit of the shareholders in the old corporation, is a proposition so wild and preposterous as hardly to merit serious consideration.

5. The objection to the jurisdiction of the court remains to be considered. The bill alleges that the plaintiff is an alien, and resident of Inniskillen, in Ireland, and a subject of the kingdom of Great Britain and Ireland. Three of the defendants are citizens of the state of New York. After the appearance in the cause of the defendants who have filed demurrers, Peter J. Kelly, a shareholder and a citizen of the state of New York, was admitted by the court, upon his own application, to come in as a party plaintiff, for the protection

of his interests as a shareholder. The defendants contend that by admitting him as a party plaintiff the jurisdiction of the court was ousted. Assuming that the joinder as co-plaintiff of an alien and a citizen of the same state with some of the defendants would be fatal to the jurisdiction, the answer to the objection is that jurisdiction once having attached, it could not be defeated by the action of the court, without the consent or concurrence of the plaintiff. The plaintiff, as an alien, being personally qualified to bring the suit, the jurisdiction is not defeated by the fact that the parties whom he represents may be disqualified. *Coal Co. v. Blatchford*, 11 Wall. 172. The admission of Kelly, by leave of court, did not, in a jurisdictional sense, make him a plaintiff. He acquired thereby no control over the suit; Graham still remains the real plaintiff and *dominus litis*, and the suit must stand or fall on the case which he makes. Perhaps the court erred in admitting Kelly as a party. But that should not prejudice Graham, as it was not done at his instance.

As the court is of opinion, for the reasons already stated, that the demurrer, for want of equity and for laches, must be sustained, it becomes unnecessary to consider many other objections to the bill raised by the demurrers which were argued by counsel.

Demurrer for want of jurisdiction overruled; demurrer for want of equity and laches sustained.

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NEBRASKA CITY NAT. BANK and others v. NEBRASKA CITY HYDRAULIC  
GAS-LIGHT & COKE Co. and others.

(Circuit Court, D. Nebraska. January, 1883.)

1. RESULTING TRUST—VENDOR.

Where the vendee of property assumes the payment of indebtedness due from the vendor to a stranger, and deducts the amount thereof from the purchase price, he does not thereby become a trustee for such stranger for the amount of such indebtedness.

2. LIMITATIONS—CORPORATION BONDS.

The fact that the failure to pay coupons within six months from maturity gave the bondholders the option to sue for both principal and interest, does not of itself cause the bonds to mature at the date of such default, or at the expiration of the six months, so as to cause the statute of limitations to begin to run.

3. JURISDICTION—CITIZENSHIP OF PARTIES.

That one of the complainants is a citizen of the state where suit is brought, does not present a question of jurisdiction which can be raised on demurrer to the whole bill.

### In Equity.

This is a demurrer to a bill in equity. The facts alleged in the bill are briefly and in substance as follows:

The plaintiff bank is organized under the national banking act. The other plaintiffs are all citizens of states other than Nebraska except James Sweet, who is a citizen of that state. The defendants are all citizens of Nebraska. On the first of October, 1872, the gas company issued 28 bonds for \$1,000 each, payable on the first of October, 1882, with interest at the rate of 10 per cent. per annum, payable semi-annually, as provided by coupons attached to the bonds. There was a further provision that if any installment of interest falling due remained unpaid for six months, the whole debt should become due. To secure these bonds the gas company executed its mortgage to J. Sterling Morton and George W. Meeker, as trustees, conveying all property and works of the company. On the first of October, 1876, the company made default in payment of its interest coupons falling due on that day. The plaintiffs respectively hold some of the bonds secured by said mortgage, and in the aggregate they are the owners of 25 of them. The trustees refuse to execute the trust. Upon these allegations complainants pray for a decree for the foreclosure of the mortgage and sale of the mortgaged premises. The bill further alleges as follows: In 1874 the firm of Connor & Son were the owners of \$86,000 of the gas company's stock, and by virtue of such ownership had control of its affairs. They sold said stock to Metcalf, Hill, Morrison, Morton, and the Pinneys, (who will hereafter be referred to as Metcalf and associates,) for \$43,000, but "in carrying out said agreement the said co-respondents required of the said Connor & Son to deduct from the said sum of \$43,000 the entire indebtedness of the said Hydraulic Gas-light & Coke Company, including the above-described bonds, and that the said Connor & Son, in order to dispose of their said stock, they being at that time financially embarrassed, and being pressed by their creditors, consented to such appropriation of the purchase money of and for the said stock then owned by them, and that in truth and in fact the above-named co-respondents only paid to the said Connor & Son for \$28,000 worth of stock in said company, which they then received, and have ever since held the difference between the total indebtedness of said company, (or what the same could be discounted for,) and the said sum of \$43,000, the agreed price thereof; that the balance of said agreed price remained in the hands of the above-named co-respondents as a trust fund, from which to discharge said indebtedness of said company, and especially the above-mentioned indebtedness of your orators, and, so far as the above-mentioned bonds are concerned, the same still remains in their hands."

The prayer is that the alleged trust fund be brought into court and be distributed among the bondholders, and that the usual decree of foreclosure and sale be entered, and for any deficiency remaining after the sale of the mortgaged premises and the application of the proceeds thereof to the mortgage debt, judgment be rendered against said confederates. There is a demurrer filed on behalf of Metcalf and as-



sociates, and also a separate demurrer by Nelson Pinney, one of the said associates, which, taken together, raise the following questions:

*First*, whether the allegations of the bill, taken as true, show that the complainants are entitled to the relief prayed as against Metcalf and associates; *second*, whether the court is deprived of its jurisdiction by reason of the fact that Sweet, one of the complainants, is a citizen of Nebraska; *third*, whether the bill is multifarious; *fourth*, whether the suit is barred by the statute of limitations of Nebraska.

*S. H. Calhoun*, for complainants.

*J. M. Woolworth* and *C. W. Seymour*, for respondents.

McCARY, C. J. 1. The allegations of the bill, taken as true, show that complainants are entitled to decree of foreclosure as prayed.

2. If the bill fairly construed charges that respondents Metcalf and associates, who purchased the stock of the gas company, have in their hands a fund set apart by agreement as a trust fund, to be paid to complainants on account of the sum due on their bonds and mortgage, then a court of equity has jurisdiction to compel said Metcalf and associates to make such payment to the extent of the fund so in their hands. If, however, the allegation is that the said Metcalf and associates agreed with Connor & Son to pay the sum due on the bonds of complainants as a part of the purchase price of said stock, then the bill is demurrable, upon the ground that there is no privity of contract between Metcalf and associates, on the one side, and the complainants on the other. *Nat. Bank v. Grand Lodge*, 98 U. S. 123.

The allegations of the bill are not as clear and distinct as they should be; and it is, therefore, not surprising that counsel should differ as to whether the creation of a trust fund for complainants' benefit, or the assumption of a debt, is alleged. If the complainants intend to rely upon the claim stated in their brief, that Metcalf and associates received from Connor & Son, a sum certain to be held in trust for the use of complainants, they should so allege with distinctness and certainty. It is not sufficient to allege this as a conclusion arising from the fact that said Metcalf and associates retained from the price of the stock a sum sufficient to discharge the debts of the gas company, including the bonds now in suit.

The conclusion would result from this, not that Metcalf and associates became trustees, but that they became liable to answer to Connor & Son in damages, upon their failure to pay the bonds and discharge the mortgage. As the bill stands, it does not sufficiently charge that Metcalf and associates held in their hands a fund that

is, in equity, the property of complainants. They stand, under the allegations of the bill, in a contract relation to Connor & Son, and not in the relation of trustees for complainants. It is not alleged that any particular sum of money was placed as a trust fund in their hands, to be paid by them to complainants or to the bondholders. The allegation, in substance, is that they owed Connor & Son \$43,000 for stock purchased, and that they did not pay the whole debt, but paid that sum, less the sum retained to meet the debts of the gas company, including the debts now held by complainants. This is the fact alleged. The conclusion derived by the pleader from this fact is that the balance of the said agreed price remained in the hands of Metcalf and associates a trust fund, from which to discharge the said indebtedness of the gas company. I understand this allegation to mean that the portion of the purchase price of the stock not paid over, and which was retained by Metcalf to meet the debts of the gas company, became, *as a matter of law*, a trust fund in their hands, for which complainants are entitled to proceed against them. It has never, so far as I know, been held, and I think it cannot be maintained upon sound principles, that where the vendee of property assumes the payment of indebtedness due from the vendor to a stranger, and deducts the amount thereof from the purchase price, he thereby becomes a trustee for such stranger for the amount of such indebtedness. To make him a trustee there must be a deposit with him of a sum of money to be held by him for the creditor, or an express agreement on his part to assume the duties and the responsibilities of a trustee. There is no resulting trust in such a case as this.

3. The plea of the statute of limitations must be overruled. The bonds sued on were not due until 1882, and the fact that the failure to pay the coupons within six months from maturity gave the bondholder the option to sue for both principal and interest, did not of itself cause the bonds to mature at the date of such default, or at the expiration of said six months, so as to cause the statute of limitations to begin to run.

4. The fact that one of the complainants is a citizen of Nebraska does not present a question of jurisdiction which would go to the whole case, and which can be raised upon a demurrer to the whole bill. If, upon further argument and consideration at the final trial, the court shall be of the opinion that complainant Sweet cannot recover because of his citizenship, the bill as to him may be dismissed without prejudice.

5. The view above expressed with regard to so much of the bill as seeks relief against respondents Metcalf and associates, renders it unnecessary to consider the question whether the bill is multifarious.

The demurrer of Metcalf and associates, in so far as it raises the question that there is no privity of contract between the complainants and the said Metcalf and associates, is sustained. In other respects the demurrer is overruled.

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UNITED STATES v. NEALE.

(Circuit Court, E. D. Virginia. January Term, 1883.)

1. PERJURY—WHO MAY ADMINISTER OATH.

A notary public of the city of Alexandria is authorized to administer the oath required by law to be taken by a director of the first national bank of that city as to his ownership of the capital stock of such bank.

2. SAME—ACT, WHEN COMPLETE.

When the oath is taken and subscribed by the accused it is complete, so far as the accused can make it, and if the notary, in certifying the fact of the oath having been taken, erroneously used the term "county" instead of "city," and used the seal of said bank instead of his own official seal, such error did not affect the oath taken.

3. SAME—BANK DIRECTOR—OATH TO OWNERSHIP OF STOCK.

If accused took an oath in which he stated that he was *bona fide* owner in his own right of the number of shares of stock then standing in his name on the books of the bank, and that the said shares were not hypothecated or in any way pledged as security for any loan or debt; and if he took it willfully, and not believing that he was stating the truth,—it is perjury, if in point of fact he was not the owner of said stock, or had pledged the same for a loan or debt.

4. PLEDGE—BY POWER OF ATTORNEY.

An irrevocable power of attorney given by the accused, wherein he constituted and appointed a third party his attorney for the purposes therein set forth, being a general power covering any indebtedness of accused to said third party, is a pledge of the shares of stock owned by accused mentioned therein, as long as there was any debt due by the accused to such third party.

The indictment was under the perjury act (section 5392 of the Revised Statutes) of the United States. It charged the accused with having willfully and contrary to what he believed to be true sworn falsely, in having, in taking the oath as a director of a national bank of the United States, stated and said that he was the owner in his own right of the number of shares of the capital stock of the First National Bank of Alexandria standing in his name on its books, and that he had not hypothecated or pledged them for any loan or debt;

whereas he had pledged them for a valid and subsisting debt. It charged that the said oath was taken before K. Kemper, a notary public of the city of Alexandria, who was duly authorized by law to administer the said oath.

The indictment recited that the oath was taken in pursuance of the requirements of section 5147 of the United States Revised Statutes, relating to the national banks, and that the oath was then certified by the said K. Kemper under his hand and official seal as notary, and then and there transmitted by him to the comptroller of the currency at Washington City, where the same remains filed and preserved.

During the progress of the evidence, and after the notary, who was a witness on the stand, had proved by his commission and qualification that he was a notary public of the city of Alexandria, the district attorney offered to put before the jury a paper from the office of the comptroller of the currency, of which the following is an exact copy. Nearly all of the paper was in printed form.

OFFICE OF COMPTROLLER OF THE CURRENCY. (Form No. 3.)

OATH OF DIRECTORS.

*State of Virginia, County of Alexandria, ss:* We, the undersigned directors of the First National Bank of Alexandria, of the state of Virginia, do each of us solemnly swear that we are citizens of the United States, and residents of the state of Virginia, and that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said bank; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Revised Statutes of the United States under which this bank has been organized; and that each of us is the *bona fide* owner, in his own right, of the number of shares of stock subscribed by him, or standing in his name on the books of the said bank, and required by said Revised Statutes; and that the same is not hypothecated or in any way pledged as security for any loan or debt.

WM. JAS. BOOTHE,  
S. FERGUSON BENCH,  
S. C. NEALE,  
JOS. BRODERS,  
E. S. LEADBEATER.

Subscribed and sworn to this eleventh day of January, 1882, before the undersigned, a notary public of said county.

{ Seal of First National Bank of Alexandria, Va. }	K. KEMPER.
{ Organized December 17, 1864. }	Notary Public.

Every director, when elected, must at once take the above oath, and transmit the same immediately to the comptroller of the currency. See paragraph 29, National Bank Act.

[Ed. 10-13, '81-4000.]

He offered to prove this paper by K. Kemper, the notary, who was a witness on the stand.

The defense moved to exclude this paper as not such a certificate as was described in the indictment; objecting—*First*, that a notary public commissioned by a state was not competent to administer an oath required to be taken by the laws of the United States; *second*, that K. Kemper, the notary on the stand, was a notary for the city of Alexandria and not for the county of Alexandria, as described in the paper now produced; and, *third*, that this paper, which should be verified by the seal of the notary administering the oath, was not so verified, but bore, instead, the seal of the bank of which the affiant qualified as a director.

After protracted argument, the court ruled as follows.

*John S. Wise*, for the United States.

*W. W. Crump, W. H. Payne, R. A. Payne, S. Catlett Gibson, and R. G. Brent*, for the accused.

HUGHES, D. J. The law of the United States defining perjury, (section 5392, Rev. St.) provides, in substance, that if any one, in taking an oath before a tribunal or officer competent to administer it, in a material matter, willfully *states or subscribes* what is false, believing it to be contrary to the truth, he shall be guilty of perjury, etc.

As to the first objection to this paper, denying the power of a notary public, commissioned by a state, to administer an oath required by a law of the United States, this is settled by the act of August 15, 1876, which expressly authorizes a notary public to administer any such oath as might then have been administered by a commissioner of a circuit court of the United States; not only such oaths as are to be "used in the courts of the United States," but "acknowledgments and affidavits" also.

This act enlarges section 1778 of the Revised Statutes, which had previously given commissioners of the circuit courts general power to administer oaths in all cases in which justices of the peace and notaries might before then have administered them.

The second and third objections to the paper offered by the prosecution rest upon the ground that the paper *varies* from the certificate referred to in the indictment, and which is alleged there to have been the instrument by which the notary certified to the comptroller of the currency the fact that the director's oath had been taken by the accused as required by law.

It must be observed that the act defining perjury provides that it may be committed by willfully *stating* what is false and what the affi-

ant does not believe to be true, or by willfully *subscribing* the same. If this indictment had looked to the latter alternative and charged throughout that the accused *subscribed* what was false, believing it to be false, the objection of variance between the paper now offered in evidence, containing in that case the *corpus delicti*, and the paper described in the indictment, could be urged with some force. But the indictment nowhere charges that the accused *subscribed* a false oath. It was drawn by a skillful and experienced pleader, now the president of the supreme court of appeals of Virginia. Its charge throughout is that the accused, in taking the oath required of him as a director by section 5147 of the Revised Statutes, relating to national banking associations, *said* and *stated* that he owned the shares of stock standing in his name on the books of the bank, and had not hypothecated or pledged them, and that he in fact had pledged them absolutely.

Now I have no doubt that this paper may go to the jury from the hands of the notary who took the affidavit of the accused, corrected, as to the errors appearing upon its face, by the testimony of the notary, examined under oath before them,—to show what oath was taken by the accused; the date on which it was taken; the exact tenor of it; that it was taken in the city of Alexandria; and what the accused *stated* in making the oath,—the witness, K. Kemper, having already shown that he was a notary public for the city of Alexandria, duly commissioned and qualified under the laws of Virginia.

The prosecution is proving its case as charged in the indictment. That instrument makes no charge as to *subscribing* falsely, but confines itself to the charge of *stating* falsely. What it alleges as to the certificate having been transmitted to the comptroller of the currency is matter of recital and surplusage. It is competent to prove the charge that the accused had *stated* falsely by testimony, either oral or written. The notary, who remembers the occasion and circumstances of administering the oath, may certainly refer to this paper as a memorandum for refreshing his memory as to the date and tenor of the oath; and, moreover, if he explains to the jury that the word *county* was erroneously used in making out the certificate instead of *city*, and that the seal of the bank was inadvertently employed instead of his own official seal, the paper thus corrected may go to the jury as part of the evidence adduced to show that the accused in fact took the oath charged, where he took it, when he took it, and the precise tenor of the oath taken.

When the evidence was concluded, counsel on either side prayed respectively for instructions to the jury. The court substituted for both the following, drawn by the judge himself:

1. The court instructs the jury that K. Kemper, as a notary public for the city of Alexandria, was authorized by law to administer the oath required by law to the accused, as a director in the First National Bank of Alexandria, on the eleventh day of January, 1882.

2. It instructs the jury that if such an oath as is required by law was administered by the said K. Kemper, as such notary public, to the accused, and was taken and subscribed by the accused, then the oath was complete when so taken, so far as the accused could make it so; and if the said K. Kemper, the said notary, in certifying the fact of the oath having been taken to the comptroller of the currency, erroneously used the term "county" instead of "city," and used the seal of the said bank instead of *his own official seal*, such errors only affected the certificate of the notary, and did not affect the oath taken by the accused.

3. The court instructs the jury that if the accused, on the said eleventh of January, 1882, as a director of the said bank, before the said K. Kemper, as notary public for the city of Alexandria, took an oath, in which he stated that he was the *bona fide* owner in his own right of the number of shares of stock then standing in his name on the books of the said bank, and that the said shares were not hypothecated or in any way pledged as security for any loan or debt; and if the accused, in taking such oath, did so willfully, not believing that he was stating the truth,—then he committed perjury, if, in point of fact, he was not the owner of the said shares of stock, or had hypothecated or pledged them as security for a subsisting loan or debt.

4. The court instructs the jury that the irrevocable power of attorney, dated March 13, 1880, which was given in evidence, purporting to be signed by the accused, whereby he constituted and appointed William Graydon his attorney for the purposes therein set forth, was a general power covering any indebtedness of the accused to said Graydon, and bound the 60 shares of the stock of the First National Bank of Alexandria, belonging to the accused, mentioned therein, if there was any debt due by the accused to the said Graydon on the eleventh of January, 1882.

See *U. S. v. Bartow*, 10 FED. REP. 873; *U. S. v. Baer*, 6 FED. REP. 42; *U. S. v. Ambrose*, 2 FED. REP. 556.

## MOSES &amp; CLEMENS v. R. W. L. RASIN &amp; Co.

(Circuit Court, D. Maryland. January 9, 1883.)

BREACH OF CONTRACT TO DELIVER GOODS FOR WHICH PROMISSORY NOTES HAD BEEN GIVEN BY VENDEE AND INDORSED AWAY BY VENDOR—DISHONOR OF NOTES AFTER SUIT BROUGHT BY VENDEE—MEASURE OF DAMAGES.

The defendants contracted to deliver goods to the plaintiff, and received the plaintiffs' notes for the purchase money, payable about one year after date. Before delivery of the goods the defendants failed in business, and plaintiffs were unable to get the goods. The defendants had meantime indorsed the notes and had them discounted. The vendees entered suit to recover the full value of the goods as of the date of the demand and refusal to deliver. After the suit was entered, but before the trial, the notes matured, and the plaintiffs did not pay them. *Held*, that notwithstanding the defendants had passed the notes away, as they were still liable on them as indorsers, the plaintiffs, not having paid the notes, could not recover the full value of the goods, but only the difference between the market value at the time of the breach of the contract and the price contracted for; and that, no such difference having been proved, the plaintiffs were entitled to only nominal damages.

At Law.

*O. Horwitz and Brown & Brune*, for plaintiff.

*T. M. Lanahan and I. N. Steele*, for defendants.

MORRIS, D. J. Action for damages for breach of contract to deliver goods sold. By contract in writing, dated July 30, 1881, between the defendants, R. W. L. Rasin & Co., of Baltimore, manufacturers of fertilizers, and the plaintiffs, Moses & Clemens, of Richmond, dealers in fertilizers, the defendants sold to the plaintiffs 2,000 tons of acid phosphate, at \$20 per ton, to be delivered free to the usual place of shipping, on cars or boats, at Wilmington, North Carolina, Port Royal, South Carolina, and Savannah, Georgia, in not less than car-load lots. With regard to delivery and payment the contract was as follows:

"The delivery to be so made at any time that may be convenient to us [Rasin & Co.,] within, say eight months from this date, by issuing to you [Moses & Clemens] an order for the said amount, on any stock of said guano which we may have at said ports, or such other ports as may be agreed upon, so that after you receive such order you may order the same forwarded to you at such times as may suit your convenience; and at the same time that we may issue to you an order as above named, you are to settle for said guano by issuing to us, or to such person as we may designate, your notes for same, to your order, indorsed by you in blank, made payable at the First National Bank of Richmond, Virginia, and to mature in equal parts on November 1, November 15, and December 1, 1882. In May, 1882, or sooner, if possible, you must deliver to us, or to our order, notes of the planters, or other purchasers, to whom you



have sold said guano, for the gross amount of all sales you may have made of said guano, to be held as collateral security for the payment of your notes herein mentioned; and all of said guano, also all proceeds thereof, you must at all times hold in trust for the payment of your notes herein named, and all of proceeds of said guano, and also of the collaterals herein referred to, must be first applied to the payment of your notes herein named as fast as such proceeds are collected, whether your notes herein named are then due or yet to become due. The collateral will be returned for collection. \* \* \* If, for convenience of discounting, we should request your notes, issued to mature at shorter times than above stated, you must so issue them; we to renew them from time to time until the final dates of maturity are reached, say first of November, fifteenth of November, and first of December, 1882."

Under this contract the defendants sent to the plaintiffs on October 17, 1881, an order on defendants' agent at Atlanta, Ga., for 500 tons of acid phosphate; and for the \$10,000 purchase money for the said 500 tons the plaintiffs executed and delivered to defendants their three promissory notes, all dated October 1, 1881, each for the sum of \$3,333.33, maturing November 1, November 15, and December 1, 1882. These notes were made by plaintiffs to their own order, and were indorsed by themselves. About December 23, 1881, the defendants failed in business, and demand being made by plaintiffs for delivery of the 500 tons of phosphate, the order for it was dishonored and they were unable to get it. Thereupon they instituted this suit to recover damages for the non-delivery of said phosphate, and they claim the full value of the goods at the date of the refusal to deliver. By agreement of the parties the issues of fact are to be determined by the court without a jury, all errors in pleading are waived, and either party is permitted to give in evidence any matter which could be offered if specially pleaded.

The facts are in great part admitted. It is conceded that the order given by defendants to plaintiffs for the 500 tons of phosphate was not equivalent to a delivery, and that there was a breach of the contract to deliver. It is admitted that after the bringing of this suit, but before the actual trial, the three promissory notes given by plaintiffs had been passed off by defendants, and that plaintiffs, under advice of counsel, have not paid them.

With regard to the indorsement of the notes by the defendants, the only evidence offered was the testimony of one of the defendants that he did indorse each of them with the firm name when he had them discounted, and the production of notices of protest. This evidence was received subject to exception, and is objected to by the plaintiffs as inadmissible without the production of the notes. As proof of the

written indorsement the evidence may be inadmissible, but I think the burden of proving that the notes were not indorsed rests upon the plaintiffs. The declaration alleges that the defendants received the notes, and, as matter of pleading, it is to be presumed that they remained in their hands until the contrary appears. They were only conditional payment, unless made absolute by some act of the defendants. The plea avers them to be overdue and unpaid. If the plaintiffs' case requires them to show that the notes were passed away by the defendants in such manner as to make them, notwithstanding their dishonor, absolute payment, it devolves upon the plaintiffs to aver those facts in their pleadings and prove them at the trial. If there had been in this case no agreement waiving formal pleading, I think, under the ruling in *Price v. Price*, 16 Mees. & W. 240, which has been followed in subsequent cases, the plea would be held good, and the plaintiffs' replication would be required to state the facts necessary to avoid it, and they would at the trial be required to prove them.

Assuming, then, what is undoubtedly the fact, that the notes were indorsed by the defendants when they procured them to be discounted, the contention of the defendants is that, by reason of the notes having been dishonored, they have acquired a right to retain possession of the goods although they have indorsed the notes away, and that, while they remain dishonored, the plaintiffs cannot recover the full value of the goods, but only the difference between the contract and the market price, if any difference is proved.

The plaintiffs, in support of their claim to recover the full value of the goods as of the time of demand and breach of the contract, invoke the rule by which, so long as the notes given by a vendee of goods are running or are outstanding in the hands of another party, so that they cannot be surrendered at the trial, the vendor cannot recover in an action for the price of the goods; and counsel argue that if the fact that the notes are outstanding will prevent the vendor from recovering from the vendee, he cannot in a like case defeat an action brought against him by the vendee for non-delivery of the goods. This, it seems to me, by no means necessarily follows. The plaintiff must always sustain every issue necessary to his recovery. It is conceded that plaintiffs have not paid for the goods. The taking of the notes was only conditional payment, and there can be no question that if they had remained in the hands of the defendants until they had matured and were dishonored, and the goods had also remained in their possession, they would have a right to retain the

goods until the payment of the price. Benj. Sales, § 767; 1 Chit. Cont. 596; *Miles v. Gorton*, 2 Crompt. & M. 511; *Dixon v. Yates*, 5 Barn. & Adol. 313.

The case would be different, of course, if the notes had been passed off by the vendor in such manner as that there could be no recourse to him for their payment. In that case, under all the decisions, he would have made what was conditional payment into absolute payment, and would be no further interested in the notes, and his lien and right of withholding delivery of the goods would be gone.

Does, then, the fact that the notes did not mature until after the bringing of this suit alter the plaintiffs' rights? The defendant, by proper plea *puis darrein continuance*, has pleaded the non-payment, and as the plaintiffs were the makers of the notes, and their dishonor is the plaintiffs' act, it would seem that if the non-payment would be good matter of defense at any time it should be allowed under a proper plea, though occurring after the bringing of the suit. The plaintiff urges that, as he had a perfect right of action when the suit was instituted, the fact that there has been delay in trying the cause should not result in defeating his right of action. It does not. The plea does not go to the right of action; its only effect is to limit the extent of the recovery. The plaintiff must at least recover nominal damages. The measure of damages for not delivering goods under such contract is the difference between the contract and the market price, (or nominal damages, if no difference is proved,) unless the price of the goods has been paid, when the measure of damages is the entire market price.

The principal and most serious question is whether the defendants, having discounted the notes and received the proceeds, even though they did indorse the notes and are liable on them as indorsers, can exercise the vendor's right of withholding the goods for non-payment of the price. No case in which the precise question has arisen just as it has in the present case has been cited, but several cases have been quoted by defendants' counsel in which the action was instituted after the dishonor of the notes, and cases arising under the right of stoppage *in transitu* upon insolvency of the buyer, where it was held that the fact that the notes given for the price of the goods were outstanding, not in the hands of the vendor, did not make the payment absolute, and did not preclude the vendor from reducing the damages, in an action against him for non-delivery, by showing that the notes for the price had not been paid.

Thus, in *Miles v. Gorton*, 2 Crompt. & M. 504, a portion of the goods sold had not been delivered, and a bill of exchange for the price of the whole parcel of goods had been drawn by the vendors, accepted by the vendee, and negotiated by the vendor. BAYLEY, B., said:

"When the bill of exchange is dishonored there is no longer payment or any thing which can be considered as equivalent to payment, and it seems to me that the assignee of the bankrupt cannot, after what has taken place, insist on delivery without actual payment. It is said the bill is still outstanding. That is true; and it may, perhaps, operate to prevent the seller from having a complete right to the goods, so as to be able to give a valid title by reselling them to a third party; but the only question in the present case is whether he had not a right to hold them until the price is paid."

In the same case, VAUGHAN, B., said:

"The moment the bill was dishonored the parties were remitted to their original situation, and the goods in question never having been out of the possession or control of the original vendor, he was entitled to his right of lien for the price."

In *Valpy v. Oakley*, 16 Adol. & E. 941, the assignees in bankruptcy of Oakley sued Valpy for non-delivery of pig-iron under a contract, and claimed as damages the full value of the undelivered iron. There had been two bills of exchange drawn on the bankrupts, and accepted by them, one of which the vendor indorsed away, and the indorsee had proved it against the bankrupt's estate. The other was held by the vendor, who also proved it, but after the commencement of the action he withdrew it and had the proof expunged.

It was argued by the assignee in bankruptcy, who stood in the place of the vendee, that to resist the claim of the vendee the defendants should be able to place him in precisely the same situation he occupied when the contract was made, which could not be done, as one of the bills had been discounted, and was outstanding. In giving judgment for only nominal damages, Lord CAMPBELL, C. J., said:

"At the time of the bankruptcy the bills given for the iron were outstanding. While current they were payment; when dishonored they were waste paper. It is as if no bill had been given. It is allowed that if the contract had been to pay by bills, and the vendees had given no bills, they could not have recovered the full value of the iron not delivered, but only the difference between the market price at the time of the breach of the contract to deliver and the price contracted for. It would be as if the payment had been to be made in ready money, and no money had been paid. The parties are here in the same situation as if no bills had been given. \* \* \* The case rests upon the principle of stoppage *in transitu*; a right which may be exercised where bills have been given for the goods and are dishonored."

*Griffiths v. Perry*, 1 El. & El. 680, was an action by an assignee of the vendee of the goods for the full value, upon failure to deliver. A bill of exchange for the whole had been accepted, and the vendor had it discounted. The vendee was entitled to immediate delivery of all the goods, but could get only part of them. CROMPTON, J., said:

"A vendor's lien on specific goods sold, is gone when a bill is given for the price, but revives if that bill is dishonored before he has parted with possession of the goods; or, rather, he then ~~acquires~~ not a lien, strictly speaking, but a right of withholding delivery analogous to the right of an unpaid vendor to stop *in transitu*. \* \* \* Here the dishonor of the bill and the insolvency of the plaintiff did not happen until after there had been a breach of the contract by the defendant, and therefore not until after the plaintiff had acquired a cause of action. *Valpy v. Oakley* is decisive to show that though matters occurring *ex post facto* cannot do away with a vested cause of action, they may be taken into consideration as reducing the damages recoverable."

See, also, Benj. Sales, § 825, sec. 235; 1 Smith, Lead. Cas. 1212; *Newhall v. Varges*, 13 Me. 93; *White v. Welsh*, 2 Wright, 396; *Arnold v. Delano*, 4 Cush. 53; Smith, Merc. Law, 661.

In the present case the application of the principles established by the cases above cited may result in hardships to these plaintiffs who are not shown to be insolvent, and who, doubtless, in giving notes having over a year to run, relied upon the proceeds of the goods to meet them. But the case is one between parties who have both made default in their obligations, and any rule which deals with their reciprocal rights must of necessity be somewhat arbitrary. From the cases cited, and others which could be adduced, it is clear that the right of a vendor in possession to retain for the unpaid price is an equity which is highly favored. It is said that such a vendor has more than a mere lien on the goods; that he has a special property analogous to that of a pawnee.

The hardship on the plaintiff is not, perhaps, so great as might at first appear. The defendants are insolvent, and their estate is in the hands of an assignee. The holder of the notes has a right to prove them against that trust estate because of the defendant's indorsement. But the plaintiffs, if they had judgment for the full value of the goods, should not be allowed to prove it and receive a dividend, for then the trust estate would be paying two dividends in respect of the same debt. *Oriental Bank v. European Bank*, L. R. 7 Ch. App. 102.

By maintaining the rule requiring the plaintiffs to pay their notes before they are allowed to recover the full value of the goods for

which they were given, it seems to me the interests of commerce, confidence in commercial paper, and prevention of multiplicity of suits will be best subserved.

The plaintiffs, then, being only entitled to recover the difference between the market value of the goods at the time of the breach and the contract price, it remains to consider the evidence on this point. The contract was made thirtieth of July, 1881, and the breach occurred December 23, 1881. One of the plaintiffs testified that as the season advanced there was a rise in price of two dollars to three dollars per ton, and that he thinks in December he would have had to pay three dollars advance for the same goods. One of the defendants testified that there was no material change in price between June and December, and that after December the goods could have been bought at less than the contract price. The only disinterested witness is a manufacturer of fertilizers in Baltimore city, who testifies that although there was an advance in September and October, that the price weakened in November and December, and may have dropped again in Baltimore to the old price, though he thinks in the south the rise may have continued until January; but that after January there was a fall in price, as there was a decline in the price of the crude materials. He remarks upon some differences of price between fresh and damp fertilizer, and that which is old and dry; but that difference does not seem to be material in this case, as under the contract the fertilizer was deliverable in the cotton states, where this difference is not important. On a review of the whole testimony on this question of the market price, I do not find that it has so satisfied me of any advance in price that I could feel safe in finding it to be a fact.

Verdict for nominal damages, each party to pay their own costs.

See *Lawrence v. Morrisania*, 12 FED. REP. 850.

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### WILKINSON v. TILDEN.

(Circuit Court, S. D. New York. January 1, 1883.)

#### 1. ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEYS.

It is the right of every client to change his attorney at his volition by substituting a new attorney of record. The right must be exercised, however, by application to the courts, which will hold the client to fair dealing with its officers, and may, in its discretion, require the client to discharge the attorney's claim for services in the suit as a condition of substitution.

**2. SAME—CONTINGENT FEES.**

A solicitor cannot require payment in advance of the substitution of another as a condition precedent, when by agreement he was to receive nothing unless the suit resulted favorably, and before there has been any recovery.

**3. SAME—COSTS AND DISBURSEMENTS.**

But where a solicitor had agreed with his client to conduct a suit for a contingent fee, and the client reserved the right to employ another attorney at any time in his stead, and the first solicitor had advanced certain funds and disbursements in the conduct of the suit, it was *held* that these disbursements should be paid back to the solicitor before a substitution; and that the order of substitution should contain a condition to protect the solicitor as for a lien for his services in the event of ultimate recovery by the client in the suit.

*Barlow & Olney*, for motion.

*Roger M. Sherman*, against.

WALLACE, C. J. The motion for the substitution of a solicitor in the place of the present solicitor of the complainant does not touch the question of the right of the present solicitor to retain such papers as may be in his hands until the payment of his lien by the complainant. The complainant simply attempts to exercise his right of changing his solicitor at his volition by substituting a new solicitor of record. His motion is resisted by the solicitor upon the ground, that he cannot be discharged from the further conduct of the suit until he is paid such sum by way of compensation as is due by reason of the agreement of retainer and the value of his professional services.

Disregarding the preliminary negotiations between the complainant and the solicitor, the agreement which embodies the final understanding of the parties is to be found in a letter from the complainant to the solicitor, of March 8, 1881, a reply thereto by the solicitor, of the date of March 14, 1881, and a subsequent letter of the date of June 8, 1881, written by the solicitor to the complainant, recognizing and assenting to the proposition contained in complainant's letter of March 8th. The agreement thus suggested and assented to, was that the solicitor should undertake the suit without other compensation than a fee contingent upon a successful result, and distinctly and explicitly reserved to the complainant the liberty to substitute another solicitor, or to associate other counsel with the solicitor, as fully as though the solicitor were employed under an ordinary retainer.

The motion therefore presents the single and simple question, whether a solicitor can require payment in advance of the substitution of another, as a condition precedent, when he is to receive nothing unless the suit results favorably, and before there has been any recovery, and when he is to have no special lien by reason of the particular agreement. The statement of the question seems to be

the only answer required. The general right of the client to change his attorney at his election is universally recognized by the authorities. This right is indispensable, in view of the delicate and confidential relations which exist between attorney and client, and the peril to the client's interests engendered by friction or distrust. The right must be exercised, however, by application to the court, in order to preserve regularity in the conduct of suits, and to prevent the confusion which might ensue if a party were at liberty to change his attorney without the knowledge of the court. *Mumford v. Murray*, 1 Hopk. Ch. 426.

When its intervention is asked for the substitution of an attorney, the court will hold the client to fair dealing, and will refuse its assistance to any attempt to take an unfair advantage of one of its officers. In this behalf courts have frequently and usually required the client to discharge the attorney's claim for services in the suit as a condition of substitution. But this is merely the exercise of a reasonable discretion, not the application of an inflexible rule. As is said in *Sloo v. Law*, 4 Blatchf. 269, "the consent is sometimes given upon terms, and sometimes without terms; sometimes upon condition that the fees of the first solicitor be paid, and sometimes without such condition."

The just discretion which should control this application will be exercised by permitting a substitution upon the terms agreed to in advance by the solicitor and client, thus enforcing the conditions made by themselves. Ordinarily, when there is an agreement that the attorney shall get his fees out of the fund in suit, there is an implied condition that he is to be continued in charge until an available fund is realized. *Hallings v. Booth*, 2 Fost. & F. 220. But here the agreement was that the client might substitute a new attorney at will. Whether the attorney will ever be entitled to any fee cannot now be known, because his compensation depends upon the result of the suit. If nothing should be realized he will not be entitled to any fee. If there is a fund realized he will be entitled to that measure of compensation for what he has already done, which is to be found in the value of his services, and the peculiar circumstances that properly tend to increase the ordinary scale of charges for professional services.

By the Code of Civil Procedure of this state the attorney has a lien for his compensation upon the cause of action which attaches to any decision or judgment in his client's favor. Section 66. Whether this statute has any application here, it is not necessary to decide.



If this were an action at law, it might well be contended that under section 914, Rev. St., conforming the practice in the federal and state courts, the same lien should attach in an action in this court; or it may be that it is to be deemed a statute of general scope, not confined to procedure in the courts of the state, which, as the law of the state where the contract was to be performed, is the law which controls the obligations of the parties to the agreement. However this may be, in view of some of the exceptional features of the case, it is equitable that provision in the nature of such a lien should be secured to the solicitor here, so that he will be fully protected, not only if a decree is obtained, but also if any settlement is made between the parties.

The complainant is a non-resident. If there is a recovery in the suit, it will be attributed largely, if not mainly, to the services already rendered by the solicitor. It appears, also, that certain funds have been advanced by the solicitor, or by clients of his not parties to the record, but interested in the litigation, for the disbursements of the action, outside of the agreement between the solicitor and complainant. These should be reimbursed the solicitor now.

An order may be entered for the change of solicitors upon payment of the disbursements already made or incurred by the solicitor in the suit, which will be ascertained by a reference to a master, if not agreed upon. The order will also contain a condition to protect the solicitor as for a lien upon the cause of action to the extent of the compensation which he may ultimately be entitled to; to be ascertained by reference to a master, or by action at the election of the solicitor, if not agreed upon.

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#### Substitution of Attorneys.

**RIGHT OF SUBSTITUTION.** The relation between a client and his attorney may be terminated by the client at any time. It is at once obvious that unless entire harmony prevail between the client and his attorney, litigation cannot be successfully conducted. Complete control over the employment of the attorney is possessed by the client, whose will or even caprice has been said to be "absolute," so far as a continuance of his relations with his attorney are concerned. *Hazlett v. Gill*, 19 Abb. Pr. 353; *Trust v. Repoor*, 15 How. Pr. 570; *Wolf v. Trochelman*, 5 Robt. (N. Y.) 611; *In re Paschal*, 10 Wall. 483; *Ogden v. Deblin*, 45 N. Y. Super. Ct. 631; *Hunt's Estate*, 1 Tucker, (N. Y. Surr.) 55. The client may substitute a new attorney at will, even where before suit he executed a power irrevocable in terms, and coupled with an interest, on the faith of which his attorney in fact has employed counsel and made large ad-

vances. But all of the disbursements incurred by the attorney in fact and the attorneys of record must first be repaid, and the latter will have a lien to the amount of any contingent fees and costs that were agreed upon. *Carver v. U. S.* 7 Ct. Cl. 500; *Pleasants v. Kortrechts*, 5 Heisk. (Tenn.) 694.

Neglect of duty in failing to bring an action, or to prepare for the trial of one already pending, of course warrants a substitution, and where the attorney discharged was employed under a special contract, he cannot recover upon a *quantum meruit* for what services he actually performed; but he can recover money for abstracts and taxes paid on behalf of the client. *Walsh v. Shumway*, 65 Ill. 472. And if the attorney brings suit against his client, this is good reason for a substitution. *Arrington v. Sneed*, 18 Tex. 135.

Courts are strict about allowing the substitution of attorneys where the application is made by an attorney. It must be clearly shown that it is the client's wish to change. Thus it has been decided, upon an application to change the attorney, where the client is unacquainted with the English language, and very illiterate and ignorant in other respects, that the affidavits must clearly prove that the purpose and object of the motion are known and sanctioned by the client. *Davies v. Lowndes*, 3 C. B. 808.

CONSENT OF COURT. While it is generally true that a client may change his attorney at will, he must make the substitution in a proper mode. First, he must obtain the consent of the court to the substitution. "This restriction is necessary to preserve regularity in the conduct of suits, and to prevent the confusion and abuses which might ensue if a party were at liberty to change his solicitor without any control of the court. Without this restriction a solicitor might be deprived of his lien for costs, the proceedings might be delayed or entangled by repeated changes of solicitors, and the court could never know when a cause is legitimately before it by the true representatives of the parties." Per Chancellor SANFORD, Hopk. Ch. 369. To the same effect see *Jerome v. Boeram*, 1 Wend. 293; *Wolf v. Trochelman*, 5 Robt. (N. Y.) 611; *Ginders v. Moore*, 1 Barn. & C. 654; *Robinson v. McClellan*, 1 How. Pr. 89; *Hoffman v. Van Nostrand*, 14 Abb. 336; *Stevenson v. Stevenson*, 3 Edw. Ch. 340; *May v. Pike*, 4 Mees. & W. 197; *Stewart v. Common Pleas*, 10 Wend. 597; *Rex v. Middlesex*, 2 Dowl. Pr. 147; *McPherson v. Robinson*, 1 Doug. 217; *Perry v. Fisher*, 6 East, 549; *Margerem v. McIlwaine*, 2 N. R. 509; *Sloo v. Law*, 4 Blatchf. 268; *Board v. Broadhead*, 44 How. Pr. 426.

It has been decided that where an attorney has acted and been treated as such, another attorney cannot proceed with the action with an order of substitution, even though the former attorney's name was not upon the record. *May v. Pike*, 4 Mees. & W. 197. See, also, *Stewart v. Common Pleas*, 10 Wend. 597. So, also, it has been decided that a plea made by an attorney who enters a cause, without an order of substitution having been made, will be set aside. *Perry v. Fisher*, 6 East, 549; *Ginders v. Moore*, 1 Barn. & C. 654; *Margerem v. McIlwaine*, 2 N. R. 509. But if a new attorney, substituted without an order of court, is treated as an attorney in the cause by the opposite party, the latter cannot object afterwards that no order of substitution was made. *Farley v. Hebbes*, 3 Dowl. Pr. 538; *Fulton v. Brown*, 10 La. Ann. 530. Generally, if the party desiring to change his attorney does so without obtaining the consent of the court and an order of substitution, the opposite party

may still treat the first attorney as the acting attorney. *Powell v. Richardson*, 1 W. Bl. 8; *McPherson v. Robinson*, 1 Doug. 217; *Grant v. White*, 6 Cal. 55. And if its consent to a substitution has not been obtained, the court will disregard the acts of the second attorney. *Jerome v. Boeram*, 1 Wend. 293.

The consent of the court to the substitution should be entered of record, and notice thereof given to the attorney of record, who may be compelled by the court to sign a written consent to the substitution. *Trust v. Repoor*, 15 How. Pr. 570; *Robinson v. McClellan*, 1 How. Pr. 89.

**TERMS OF CONSENT—ATTORNEY'S LIEN AND PAYMENT FOR FEES.** The matter of consent is largely governed by the discretion of the court, which may or may not impose conditions. Consent will be given only upon terms that are just. A court will protect its officers; and it may require payment of fees earned before allowing the substitution sought. *Wolf v. Trochelman*, 5 Robert. 611; *Bolton v. Tate*, 1 Swanst. 84; *Hoffman v. Van Nostrand*, 14 Abb. Pr. 336, which decides that this rule applies even to a nominal party who undertakes to substitute a new attorney.

Whether payment of fees is required as a condition precedent to substitution, the attorney's lien for fees earned is not destroyed or affected by the change of attorneys. *Newton v. Harland*, 4 Scott, N. R. 769; *Merrivether v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, 13 Ves. 295; *Hazlett v. Gill*, 19 Abb. Pr. 353. Thus, where a board of supervisors by their vote discharged a firm of attorneys, it was decided that they must pay the firm's reasonable claims, which should be ascertained by a reference; and, further, it was held that the attorneys were not bound to consent to a substitution, or to deliver the papers upon which they had a lien, until their fees were ascertained and paid. *Board v. Broadhead*, 44 How. Pr. 411. And the fact that the attorney removed has other sufficient security for his costs is no reason for departing from the rule requiring costs to be paid before substitution. *Witt v. Ames*, 11 W. Rep. 751. Further, the bringing of an attachment by the attorney against the client to compel him to pay fees is no ground for ordering the solicitor to be removed from the cause without payment of fees. *Sloo v. Law*, 4 Blatchf. 268.

Payment of fees upon substitution cannot, however, be compelled by proceedings against the client for contempt. *Gardner v. Tyler*, 5 Abb. Pr. (N. S.) 33; S. C. 36 How. Pr. 63; *Harley v. Collett*, 7 Dowl. Pr. 599. If there is an order for changing upon payment of the first attorney's bill, upon taxation and delivery up of papers the first attorney is entitled to the possession and control of the order to enable him to enforce the payment of his bill. *Alger v. Hefford*, 1 Taunt. 38; *Newton v. Harland*, 4 Scott, (N. S.) 769. In *Stevenson v. Stevenson*, 3 Edw. Ch. 359, it is decided that a court will not make the payment of solicitors' costs a condition of the substitution, but will leave him to his remedy at law against the client, and preserve to him any lien he may have on papers or a fund in court. In another case it is held that if the party desires papers in the possession of the attorney removed, they must first discharge his lien for fees, and that if the attorney does not insist upon this the order for substitution must provide that the taxable costs in the action, if collected on the termination of the action, be paid to the first attorney, to whom, it was said, they equitably belonged. *Prentiss v. Livingston*, 60 How. Pr. 380.

The law appears to be that the attorney removed has a right to be paid the fees he has earned, and may recover them by suit against the client who has discharged him. The relation of attorney and client being one of employer and employe, the discharged attorney may recover from his employer, the client, whatever damages he may have suffered from the client's wrongful breach of the contract of hiring. *Prentiss v. Livingston*, 60 How. Pr. 380. The attorney may also compel payment by refusing to surrender papers in the cause, upon which he has a lien, until his fees are paid. According to several English decisions cited *supra*, the court will also place the order of substitution in control of the removed attorney, who may prevent its enforcement until he is paid his costs. It appears that to obtain possession of papers in the possession of a former attorney an independent proceeding is necessary. *Egan v. Rooney*, 38 How. Pr. 121.

**AFTER JUDGMENT.** Generally an attorney's authority ends with the rendition of a judgment or decree, and an order of substitution is not then necessary to enable a new attorney to proceed in the cause. *Egan v. Rooney*, 38 How. Pr. 121. Thus no order of court is necessary to enable a new attorney to sue out execution, (*Tipping v. Johnson*, 2 Bosw. & P. 357; *Thorp v. Fowler*, 5 Cow. 446;) to move for a new trial, (*Doe v. Bransom*, 6 Dowl. Pr. 490;) to enter satisfaction of judgment, (*Marr v. Smith*, 4 Barn. & Ald. 466;) to bring an appeal or writ of error, (*Batchelor v. Ellis*, 7 Term R. 337; *Hussey v. Welby*, Sayers, 218; *Bendernagle v. Cocks*, 19 Wend. 207; *Gonnigal v. Smith*, 7 Johns. 106; *Cocks v. Brewer*, 11 Mees. & W. 51; *Burgess v. Abbott*, 6 Hill, 135; *Dearborn v. Dearborn*, 15 Mass. 316.) So, on issuing an attachment for contempt of court in not performing an award, a different attorney from him who was attorney on record in the original suit may be appointed by the party without a substitution entered of record, or ordered of court, (*State v. Gulick*, 17 N. J. Law, 435,) and a judgment creditor may employ a new attorney to enforce his judgment without any formal substitution, on notice thereof, (*Knox v. Randall*, 24 Minn. 479.)

**NOTICE.** Notice to the opposite party must be given of the substitution. If not given, the attorney of record, or, if there be none, the party personally, may be treated as representative of the cause, and notice of motions, etc., served upon them by the opposite party. *Ryland v. Noakes*, 1 Taunt. 342; *Clement v. Crossman*, 8 Johns. 287; *Hardenbergh v. Thompson*, 1 Johns. 61; *Hoffman v. Rowley*, 13 Abb. Pr. 399; *Robinson v. McClellan*, 1 How. Pr. 89; *Dorlon v. Lewis*, 7 How. Pr. 132; *Given v. Driggs*, 3 Caines, 150; *Hildreth v. Harvey*, 3 Johns. Cas. 300. But the order of substitution need not be served; notice is enough. *Bogardus v. Richtmeyer*, 3 Abb. Pr. 179. As to notice, see, also, *McPherson v. Robinson*, 1 Doug. 217; *Wynne v. Wynne*, 2 Scott, N. R. 615; *Rex v. Middlesex*, 2 Dowl. Pr. 147; *Darnell v. Harrison*, 1 Harr. & J. 137; *Lovejoy v. Dymond*, 4 Taunt. 669.

**COMPENSATION.** Several cases decide points relative to the compensation of attorneys in case of substitution. The employment of an attorney is entirely a matter of contract, which, if not expressly made between the client and his attorney, will be implied by law. If implied, the attorney is entitled to a reasonable compensation, which he may secure in an action for a *quantum*

*meruit*. Where a special contract as to compensation is made, of course it governs the recovery. In case of the wrongful breach of the contract of employment by either party, the other may recover his damages therefor.

Where a law firm is engaged and paid for their services in advance, upon the death of one of the firm, the other, who subsequently alone conducts the suit to its termination, cannot recover extra compensation for his services since the death of his partner. *Dowd v. Trout*, 57 Miss. 204.

If an attorney, employed to defend a suit, is after some progress compelled by an election to the bench to retire from its charge, and engages the services of a substitute, who performs the duty, an action is maintainable by the first attorney to recover payment for the whole services rendered by both himself and his successor. *Fenno v. English*, 22 Ark. 171; *Allcorn v. Butler*, 9 Tex. 56. If the client is dissatisfied with the substitution, it is his duty to tender compensation for the services rendered, and to rescind the contract of employment. *Fenno v. English*, *supra*. If he does not do so, but, with notice of the substitution, accepts the services of the new attorney, the client cannot, when sued for fees, object to the substitution. *Allcorn v. Butler*, 9 Tex. 56; *Smith v. Lipscomb*, 13 Tex. 532.

If the attorney retained forms a partnership subsequently to his being employed, the new partner is not a party to the contract of employment, nor can he be made one except by consent of the client. The new partner is not the attorney of the client; and consequently the attorney first employed may sue alone to recover for his services. *Davis v. Peck*, 54 Barb. 426.

Of course, if the attorney abandons the cause before its termination he is thereby deprived of any claim for his fees under a special contract of employment, and loses whatever lien he may have under it, upon the proceeds of the suit. But it seems that he may recover what his services are reasonably worth upon a *quantum meruit* count. *Morgan v. Edwards*, 38 Ill. 65. In one case an attorney was employed to defend a party on a criminal charge, upon a fee to be paid after his services were rendered, and upon tendering such services was told by his client that he would no longer need him, as other counsel had been employed; whereupon the attorney informed the client that he was ready to comply with his contract and would make *him* do so; but he volunteered his services and assisted in the prosecution of the case. It was decided that, although the attorney might have recovered his fee by a continual tender and readiness to perform his part of the contract until the case was ended, yet his volunteering on the other side, and actually assisting in the prosecution, was an abandonment of the contract which forfeited his right of recovery. *Cantrell v. Chism*, 5 Sneed, 116.

An interesting case is *Meyers v. Crockett*, 14 Tex. 257, wherein an attorney was employed for a stipulated fee to prosecute a suit to final judgment, and was dismissed by the client without any fault on his part. It was decided that he was entitled to recover for the services already rendered, and the court questioned whether he was not entitled to recover the whole fee stipulated to be paid. "There would seem to be much reason," said the court, "in holding that he [the attorney] was entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract. The case

differs from the common cases of the contracts of builders, overseers, etc., in which it has been held in the later decisions that a readiness to perform or a tender of performance is not in all respects equivalent to performance; that, though it is so for the purpose of sustaining an action, it is not so for the purpose of ascertaining the measure of damages. The relation of attorney and client is a peculiar and confidential relation. It is incompatible with that relation for the attorney to accept the employment or the confidence of both parties. And after accepting an employment and enjoying the confidence of one of them, though afterwards discharged by his client without cause, the attorney cannot in general, with propriety, accept an employment by the opposite party in the same case. This consideration would seem to afford a good reason why such contracts should be excepted from the rule to which we have adverted, and the attorney be entitled to recover the full amount of the fee for which he contracted with his client, who had wrongfully prevented him from performing his contract."

**ATTORNEY'S EMPLOYMENT OF SUBSTITUTES.** As a general rule, the employment of an attorney to prosecute or defend a suit does not confer upon him authority to employ a substitute to act in his place. The relation is one of personal trust and confidence, and the attorney cannot delegate his duties without the consent of his client. *Hitchcock v. McGehee*, 7 Porter, (Ala.) 556; *In re Bleakley*, 5 Paige, 311; *Johnson v. Cunningham*, 1 Ala. 249. He cannot employ assistant counsel and bind his client to pay him. *Paddock v. Colby*, 18 Vt. 485; *Gillespie's Case*, 3 Yerger, (Tenn.) 325; and see *Douglas v. State*, 6 Yerger, (Tenn.) 525; *Ratcliff v. Baird*, 14 Tex. 43; *Cook v. Ritter*, 4 E. D. Smith, 253. But an attorney may employ a substitute or assistant with the consent of his client, or his subsequent ratification. *Johnson v. Cunningham*, 1 Ala. 249; *King v. Pope*, 28 Ala. 601; *Smith v. Lipscomb*, 13 Tex. 532. And if an attorney has power to compromise, his substitute, duly appointed, possesses the same power. *Peries v. Aycenina*, 3 Watts & S. (Pa.) 64.

In *Briggs v. Georgia*, 10 Vt. 68, it is decided that an attorney employed to manage a suit may, in the absence of his employer, engage assistant counsel, and such counsel may charge his fees to the attorney or his client. It is otherwise, however, if the client or his authorized agent is present at the trial. And the attorney who employs a substitute or assistant will himself be liable for the fees of such substitute or assistant. *Scott v. Huxie*, 13 Vt. 50. So, if an attorney receives a demand for collection and turns it over to another attorney, who collects but fails to pay it over, the first attorney is liable. *Pollard v. Rowland*, 2 Blackf. (Ind.) 22. If the second attorney, having collected the demand, refuses to pay it over except upon an order from the first attorney, the presumption is that he is the agent of the first attorney, who cannot be held liable for the money collected until after a demand and refusal. *Cummins v. McLain*, 2 Ark. 402. And where an attorney received a note for collection, which he sent to another attorney, who collected but failed to pay over the amount, it has been decided that the first attorney has no right of action in his own name against the second attorney, unless he can show some special property or lien in or upon the amount as a claim for commissions, or an indorsement of the note in blank for collection. *Herron v. Bullitt*, 3 Sneed,

(Tenn.) 497. But where one attorney gave a note to another to collect without instructions as to its ownership, and the money collected was remitted to the payee of the note, whose name was indorsed on the note, it was held that this remittance, the payee not being the owner, did not discharge the collecting attorney from liability to his immediate principal; and that the action of the latter for the money would not be defeated by proof that he was himself the agent of the indorsee, unless the indorsee had asserted his right to the money as against his client. *Lewis v. Peck*, 10 Ala. 142.

Chicago.

ADELBERT HAMILTON.

### *In re* SCHWARZ, Bankrupt.

(District Court, S. D. New York. June 6, 1882.)

#### 1. INJUNCTION—VIOLATION OF ORDER STAYING SUITS.

Where a bankrupt obtained an injunction order from this court staying all suits and proceedings against him on the part of certain creditors, their agents and attorneys, to collect certain specified debts, and thereupon a suit by one of the creditors was discontinued, and afterwards a new suit was brought through the same attorneys in the state court for the recovery of the same debt, with allegations of fraud, *held*, that the last-named suit was a violation of the injunction order.

#### 2. SAME—VACATING ORDER OF ARREST.

This court has no authority to vacate an order of arrest for fraud granted by the state court, though it may restrain the proceedings thereon.

#### 3. CONTEMPT—INSUFFICIENT PROOF OF SERVICE—WAIVER.

On motion to punish the attorney for contempt, the proof of service of the injunction was held too loose and general; and a reference was ordered to take further proof in respect to the service of the injunction order. *Held*, also, that the contempt, if proved, was not waived by the bankrupt's noticing the cause for trial in the state court.

In Bankruptcy.

A. Blumenstiel, for the motion.

D. T. Porter, opposed.

BROWN, D. J. I am not referred to any authority for this court's vacating an order for the arrest of the bankrupt granted by the superior court, although it might have enjoined the parties from proceeding under the order. The motion to vacate the order of arrest must, therefore, be denied. The implied injunction or restraint upon suits against the bankrupt by force of the operation of the bankrupt law itself (section 5106, etc.) does not furnish any foundation for proceedings for contempt in this court, because the United States courts cannot punish for contempt except for disobedience of some express

order or command of the court itself. Rev. St. § 725; *In re Cary*, 10 FED. REP. 625.

The only question remaining is whether the injunction order of December 13, 1875, after due service, has been violated. The decision in the *Case of Schwarz*, 15 N. B. R. 330, is an express adjudication of the circuit court that the suit of Ewart & Son could not be prosecuted during the pendency of the bankruptcy proceedings until the determination of the court on the question of the bankrupt's discharge, notwithstanding the fact that the debtor would not be discharged by reason of fraud. In that case the prosecuting creditor had not proved his claim. The case is still stronger where, as in this case, the creditor has proved his claim in bankruptcy; since, by section 5105, it is declared that he shall not "be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him."

I do not think the injunction order of December 13, 1875, can be held, upon its fair construction and meaning, to be limited to the prosecution of suit already commenced. The language of the first part of the order is "that all suits and proceedings on the part of William Ewart & Son, C. A. Auffnordt & Co., H. B. Claffin & Co., or either of them, their agents and attorneys, against the said bankrupt, to collect the debt set forth, be and the same are hereby stayed to await the determination of the court in bankruptcy on the question of the discharge herein."

To discontinue a pending suit under such an order, and then immediately commence a new one for the recovery of the same essential claim, would be an evasion of the meaning and plain intent of the injunction order. To hold a party for contempt, the terms of the injunction alleged to be violated should, doubtless, be reasonably plain and free from ambiguity. Although, in a certain technical sense, the term "stay" may be said to apply to proceedings already commenced, yet its general meaning is "to forbear to act;" "to stop," (Webst. Dict. ;) and by this meaning of the word "stay," in the phrase above quoted from the injunction order, the intent is plainly expressed to stop all proceedings to collect the debts referred to. To stop proceedings necessarily means to stop, not past proceedings alone, but future ones also, and applies equally to proceedings pending and to proceedings *de novo*.

The suit then pending for debt on contract was discontinued; the one recently commenced is really for the same debt, although accompanied by allegations of fraud, which, under the Code, must



be proved to entitle the plaintiff to recover. Code, § 549, subd. 4. It is therefore within the injunction, and the plaintiff's agent and attorney are guilty of contempt in disobeying this order by commencing the recent suit without leave of this court, if the injunction order was duly served on them or came to their notice.

The proof of service of the order, however, is too general and loose to warrant the court in imposing a fine; a reference will, therefore, be ordered to take proof as to the service of the original injunction order. The proceedings in the superior court on the part of the defendant, in answering and in noticing the cause for trial, do not purge the plaintiff's agents and attorneys of their contempt in disobeying the order, whatever may be their effect otherwise; nor does the extraordinary delay of the bankrupt in proceeding for his discharge. The remedy of the creditor has long been open to vacate the stay. Until regularly discharged, or modified, it must be respected

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WHITE and others v. LEE.

(Circuit Court, D. Massachusetts. January 20, 1882.)

1. PATENTS FOR INVENTIONS—PATENTABLE DIFFERENCES.

In a patent for an improvement on shoe-tips, the fact that one takes twice as much sole leather as the other is not of itself a patentable difference.

2. SAME—LICENSE FEES—SUIT FOR ROYALTIES.

In a suit by a patentee against a licensee for license fees, for the use of a patented improvement, something corresponding to an eviction of the licensee must be pleaded and proved if he would defend against an action for royalties.

3. SAME—IMPROVEMENTS IN SHOE-TIPS—VAMPS DISTINGUISHABLE.

Where plaintiffs' claim must be construed as a "shortened vamp,"—that is a vamp which ends substantially where the box-toe begins, as the means of uniting the box toe and tip to the upper, and defendant's vamp is carried for the full length over the toe and laced with the sole, it cannot be considered the use of plaintiff's shortened vamps.

*James E. Maynadier*, for complainants.

*George L. Roberts*, for defendant.

LOWELL, C. J. The plaintiffs entered into a written contract with the defendant, by which they gave him a license to use the improvements contained in two certain patents belonging to them, of which Hugh White, one of the plaintiffs, was the inventor. Both patents were for improvements in shoe-tips; both have been reissued, and are in the record. This bill is brought in respect to one of them, No. 190,655, issued May 8, 1877, and reissued January 7, 1879, as

No. 8,536. The case, which has been before the court on matters of pleading, (3 FED. REP. 222; 4 FED. REP. 916,) now comes up for final disposition. The contract provided, among other things, that the defendant should pay 10 cents for each pair of shoes which he should make containing the improvements, or either of them, or any material part thereof, but he might buy of the plaintiffs certain stamps for one cent each, and one stamp affixed to each pair of shoes should be a performance of this condition.

One of the defendant's agreements was: "He will not in any way contest the validity of said patents, or either of them, or any re-issue or renewal thereof, nor the sufficiency of the specifications, or the validity of the licensor's title, nor the fact of his infringement in the manufacture and sale of said shoes." One of the mutual stipulations was: "In case of the reissue of said patent, the grant herein shall be good under said reissue, and the foregoing stipulations and agreements, on the part of the respective parties, shall be binding upon them in the same manner and to the same extent as though such reissue had never been obtained."

I intimated on a former occasion that the stipulation not to contest the fact of infringement was insensible and repugnant, inasmuch as the agreement is only to pay for such shoes as embody the invention, or some material part thereof, and both counsel agree that the question of infringement, or what would be infringement in a patent case, is open.

The defendant has introduced evidence tending to prove that the reissue is void for several reasons, and that the original patent, No. 190,655, was void for want of novelty; and there certainly is a very striking likeness between the shoe-tip claimed in this second patent and one which was described and drawn, but not claimed, in the first, No. 159,991. The patentee himself, (page 183,) though he says there is a vast difference between them, can point out none, except that "one takes twice as much sole leather as the other," which is not, of itself, a patentable difference.

The question has been argued whether the defendant can resist an action for license fees, under a contract, by proving that the patent is void. In his very thorough brief the defendant cites all the important cases; and they in a cursory examination seem to present a difference of opinion, which on a more careful study will be found to disappear. Many of the decisions treat a licensor as a landlord, and a licensee as his tenant, who cannot dispute the title so long as he has the occupancy of the premises. Many of the cases, such as

*Bowman v. Taylor*, 2 Adol. & E. 278; *Smith v. Scott*, 6 C. B. (N. S.) 771; *Wilder v. Adams*, 2 Wood. & M. 329, are actions at law, and turn upon the effect of a recital or covenant in a sealed instrument. The agreement in this case is not under seal, and this is not an action at law.

Other cases state the general doctrine in a somewhat absolute and general way, hardly admitting exceptions. See *Crossley v. Dixon*, 10 H. L. Cas. 293; *Clark v. Adie*, 2 App. Cas. 423. On the other hand, there are cases in the United States which seem to hold that the invalidity of the patent may always be proved, such as *Harlow v. Putnam*, 124 Mass. 553. But these were cases on either side which required no nice distinctions. The law is, I think, that a plea or answer that the patent is void, is not, of itself, a sufficient defense, but that evidence of what may be called an eviction is such defense. The difficulty is to ascertain what amounts to an eviction in a patent case. It is easily discovered whether a tenant of a certain parcel of land has or has not been evicted; but, if a patent is void, still the licensee may have had all the benefit of a valid patent, because his exclusive title may never have been disputed. In *Lawes v. Purser*, 6 El. & Bl. 930, 932, the counsel for the plaintiff admitted that if every one had publicly used the patented invention, that might be equivalent to an eviction; but contended that a simple plea that the patent was void might mean merely that the pleader, when he began to draw his plea, had discovered a technical flaw which no one else had thought of; and the judgment pursued this exact line of reasoning. In a case in Massachusetts, the defendants, who were licensees, and had used the patent to keep off competition, were said by THOMAS, J., to have had all the benefit of a valid patent. *Bartlett v. Holbrook*, 1 Gray, 114. In New York, in a case which was twice brought before the court of appeals, it was held—*First*, that mere invalidity of the patent was not a defense; and, *second*, that a repeal of the patent was a defense. *Marston v. Swett*, 66 N. Y. 206; S. C. 82 N. Y. 526. These cases point to the true distinction, however difficult its application may sometimes be, that something corresponding to eviction must be proved if a licensee would defend against an action for royalties.

In the present case I do not see any evidence that the defendant, if he practices the invention, has been "evicted," either by competition or otherwise, in such a way as to afford a defense, in face of his express stipulation not to set up the invalidity of the patent, supposing that to be equivalent to the estoppel which the law implies, which is the most favorable view for the defendant.

I do not find, however, that he has practiced the invention. The only claim in controversy is the first of the reissue: "A boot or shoe provided with an outside box-toe and tip in one piece, made from sole leather, separate from the sole, and united to upper and sole, substantially as described."

The description in the specification, the state of the art, and the history of the grant of the patent, make it necessary to construe this claim as including a "shortened vamp"—that is, a vamp which ends substantially where the box-toe begins—as the means of uniting the box-toe and tip to the upper. This is the combination which was described and patented at first, and it is what the first claim must now mean or it is void. I do not consider the defendant's vamp a shortened vamp in this sense; it is carried for the full length over the toe and lasted with the sole; stock is saved by rounding off the the corners, but not in the direction of the length of the vamp; and the plaintiffs' very narrow claim will not admit of calling this vamp an equivalent for their shortened vamp.

Bill dismissed, with costs.

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### THE WILLIAM LAW.

(District Court, D. Delaware. 1882)

#### 1. PILOTAGE—REGULATIONS—AUTHORITY OF STATE OF DELAWARE.

The act of 1789 had the effect to confer on the state of Delaware authority over the subject of pilotage on the navigable waters within her limits, and while she could not pass any law excluding the duly-qualified pilots of adjoining states on the same waters, she could impose such regulations as she deemed conducive to the public welfare upon pilots licensed under her laws.

#### 2. SAME—OFFER OF SERVICES—HALF PILOTAGE.

The breakwater in Delaware bay constitutes, within the act of congress and the usages of navigation, a "port," in the proper and maritime sense of the term, and the offer of a Delaware pilot to take a vessel from sea into the breakwater is the exercise of a legitimate authority on his part, and the refusal of the vessel to accept his services entitled the pilot to half pilotage according to the state law.

#### 3. SAME—RECOVERY—REMEDY IN REM.

Where the state law, in a distinct and separate clause, gives the alternative of proceeding to recover pilotage by a libel in admiralty in any United States district court, and where, by rule 14 of the general rules in admiralty adopted by the supreme court of the United States prior to the passage of such state law, it is clearly indicated that the libellant in a suit for pilotage may elect to proceed *in rem* or *in personam*, the remedy *in rem* is proper in suits brought under the state statute.

In Admiralty. Libel for half pilotage.

*George Gray and E. G. Bradford, Jr.*, for libelant.

*J. Morton Henry and H. G. Ward*, for respondent.

BRADFORD, D. J. This is a claim for half pilotage under the act of the general assembly for the state of Delaware, for refusing to take the libelant, a duly-licensed first-class pilot, who offered his services to pilot the said vessel from a point to the north-east of Cape Henlopen light-house to the Delaware breakwater, to which place she was bound for orders.

The facts of this case are admitted as set forth in the libel.

The act above referred to, bearing upon this case, is in the following words:

"Sec. 18. The fees for pilotage are hereby established as follows: \* \* \* For every vessel drawing over 12 feet, and not more than 15 feet, \$4.16 per foot. \* \* \* Every ship or vessel bound to the breakwater for orders shall pay pilotage fee as follows: A sum equal to half pilotage to the port of Philadelphia. \* \* \*"

Section 5 provides that—

"Every ship or vessel propelled by steam or sails, arriving from or bound to any foreign port or place, except such as are solely coal-laden, passing in or out of the Delaware bay by way of Cape Henlopen, shall be obliged to receive a pilot; that every such ship or vessel bound for the Delaware breakwater for orders, and not proceeding further up the Delaware bay, shall be obliged to receive a pilot, provided she is spoken, or a pilot offers his services, outside of the Cape Henlopen light-house, bearing south-west; and if the master of any of the said ships or vessels, after she is spoken or a pilot offered, shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel, to be recovered by suit in our state courts or before a justice of the peace, or such pilot may pursue his remedy therefor by a libel in admiralty in any United States district court, as such pilot may see fit and proper to do."

The general facts as admitted are—

(1) That the libelant, Chambers, was a duly-licensed first-class pilot under the laws of Delaware at the time, on June 26, 1881.

(2) That on the last-named day the British ship *William Law*, being then bound from Antwerp, Belgium, to the Delaware breakwater for orders, not in ballast nor solely coal-laden, appeared off Cape Henlopen light-house, and bearing E. N. E. from the same, and being outside of said light-house between six and seven miles, bearing S. W. from the said vessel.

(3) The libelant offered his services to the master of said ship to conduct her to the Delaware breakwater, but the latter then and there refused to take the libelant as a pilot to conduct said ship to the breakwater aforesaid,

although said ship then had no pilot on board of her, and the libellant was the first to offer himself as pilot.

(4) Immediately after said refusal the vessel proceeded without any pilot to the Delaware breakwater, and there awaited for and received orders before proceeding up the Delaware bay.

(5) Said ship drew 13 feet of water.

(6) The course which the ship must have taken to get to the breakwater from the place where she was spoken by the libellant was exclusively within the jurisdiction of the state of Delaware.

We will first consider the powers of the state of Delaware to pass pilotage laws.

As far back as 1789 an act of congress containing the following provisions was passed:

"Until further provision is made by congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively enact for the purpose." Section 4235, Rev. St.

The applicability of this act to the state of Delaware has been long since recognized by a decision of the United States supreme court in *Cooley v. Board of Port Wardens*, 12 How. 299; also in the case of *Steam-ship Co. v. Joliffe*, 2 Wall. 450; in the former of which cases the court says the regulation of the whole matter is left to the respective states, in the absence of any congressional action or limitation. This matter has been elaborately discussed by the learned judge of the United States district court for the eastern district of Pennsylvania, in *The Clymene*, 12 FED. REP. 346, in which he says:

"The first of these statutes (act of 1789) conferred upon the state of Delaware (if she had it not before) authority over the subject of pilotage on the navigable waters within her limits; such at least, was its effect."

In these views this court fully concurs. It will thus appear that under the provisions of the act of congress above quoted, Delaware had full authority to regulate pilotage services within her navigable waters; and while she could not pass any law excluding the duly-qualified pilots of adjoining states on the same waters, she could impose such regulations as she deemed conducive to the public welfare upon the pilots licensed under her own laws.

Assuming the facts to be as stated in the libel and answer, as to the location of the vessel and her relative position to the breakwater, I have no hesitation in deciding that the breakwater constituted, within the meaning of the act of congress and the usages of navigation, a "port," in the proper and maritime sense of the term. More-

over, that it was just as necessary for the safety of vessels and the due preservation of commerce, that there should be as proper a provision for their safe convoy and arrival at that place as at any other port on the seaboard. It follows, therefore, that the offer of the Delaware pilot to take the said vessel into the breakwater was an exercise of legitimate authority on his part, and that the refusal of the vessel to take the pilot was in violation of the law, for which the pilot had his remedy.

It has been decided that an offer to pilot a vessel, with a present capacity to perform the duty, which is refused by the vessel, is equivalent in point of law to the actual performance of the service, and entitles the pilot to the same compensation as if he had actually performed it. *Ex parte McNeil*, 13 Wall. 236; *Steam-ship Co. v. Joliffe*, 2 Wall. 450; *Cooley v. Board of Wardens*, 12 How. 299; *The California*, 1 Sawy. 463. Any attempt by legislation of the state of Delaware to exclude a first-class pilot, licensed under the laws of Pennsylvania or New Jersey, is without doubt inoperative and void. This view has been expressed by Judge BUTLER in a recent decision before referred to, in *The Clymene*.<sup>\*</sup> Nor do we understand that any such right is claimed in the present instance. It will also be observed, as before said, that in the course of this vessel from the place where she was spoken by the libellant to the breakwater, she passed over no other territory than that within the jurisdiction of the state of Delaware.

We think enough has been said to show that the service performed by the libellant entitles him, under the laws of the state of Delaware, to his claim for half pilotage.

The respondents urge, that admitting the right of the state of Delaware to regulate the conduct of pilots licensed under her own laws, they have no right to compel vessels passing up the bay and bound to the port of Philadelphia to accept any other pilot than those they see fit to elect, and that such an act would be an unwarranted interference with the free exercise of commercial rights of adjacent states. Under the state of facts as disclosed by the pleadings we do not think it requisite to decide this question, for, in point of fact, this vessel was bound to the breakwater for orders, to which place she proceeded and anchored, so that the whole scope of action of the libellant was confined to the Delaware waters, within the exclusive jurisdiction of the state. In this view of the case it is evident that

<sup>\*</sup>See 12 FED. REP. 346.

the question of compulsory pilotage upon vessels bound to the port of Philadelphia does not arise.

Admitting the libellant's right to recover half pilotage by virtue of the laws of Delaware, whose validity is affirmed by the act of congress, the next question is, has he pursued the proper remedy?

It is contended that the only proceeding authorized by the statute in question is an action *in personam* against the master, owner, or consignee, and not *in rem* against the vessel.

It is contended that while the Delaware statute gives a right of recovery, it nowhere gives in express terms the right to proceed *in rem*, and by reason of this omission the libellant is barred from this remedy. The distinction between the right which is created by the statute, and the remedy to enforce that right by a proceeding *in rem*, is insisted upon. The words of the statute creating the right and pointing out the remedy are as follows:

"Sec. 5. And be it further enacted that every ship or vessel propelled by steam or sails arriving from or bound to any foreign port or place, except such as are solely coal-laden, passing in or out of the Delaware bay by way of Cape Henlopen, shall be obliged to receive a pilot; that every such ship or vessel bound to the Delaware breakwater for orders, and not proceeding further up the Delaware bay, shall be obliged to receive a pilot, provided she is spoken, or a pilot offers his service outside of the Cape Henlopen light-house bearing south-west; and if the master of any of the said ships or vessels, after she is spoken or a pilot offered, shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay, to any such pilot suing for the same, a sum equal to the pilotage of such ship or vessel, to be recovered by a suit in our state courts or before a justice of the peace, or such pilot may pursue his remedy therefor by a libel in admiralty in any United States district court, as such pilot may see fit and proper to do."

The supreme court of the United States has already decided, in the case *In re Walter & Hagar*, that the service performed was a pilotage service, and as such was within the admiralty jurisdiction of this court; and while it expressed no opinion as to the remedy which was to be pursued, it left that matter open to be determined by the authorities and practice in courts of admiralty. The fourteenth general rule in admiralty established by the supreme court indicates clearly that the libellant in suits for pilotage may elect to proceed *in rem* or *in personam*. We think it may be as fairly inferred from an examination of the Delaware statute that the remedy by an action *in rem* was contemplated by them as a proper one, for in addition to giving the personal remedy against the master, owner, or consignee, cognizable by state courts, in a distinct and separate clause, it gives



the alternative of proceeding to recover the pilotage by a libel in admiralty in any United States district court. We can see no valid reason, after this power to proceed by a libel in admiralty is fully given, why this jurisdiction should be abridged of one of its most efficacious remedies. As has been said, there is nothing to indicate that such was the intention of the legislature. The rule of the supreme court referred to was promulgated in pursuance of the act of the twenty-third of August, 1842, c. 188, and the Delaware statute giving admiralty jurisdiction was passed during the last session of the legislature, on April 5, 1881, and it is fair to suppose that it was meant to be in harmony with the rule of the supreme court referred to.

As a result of the whole matter, we conclude that the libelant is entitled under the laws of Delaware to receive the sum of money due him for half pilotage, and that he has selected a suitable and legal remedy by proceeding *in rem* in the district court of the United States in admiralty, and shall order a decree to be entered accordingly.

See *The Lord Clive*, 10 FED. REP. 135; S. C. 12 FED. REP. 81; *The Glaramara*, 19 FED. REP. 678; *The Whistler*, 13 FED. REP. 295.

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### THE BLENHEIM.

#### THE SAN CARLOS.

(*District Court, D. Massachusetts. December 14, 1882.*)

#### COLLISION—SPEED OF STEAMER—FAULT.

A steam-vessel but little under control of her helm, owing to the retarding influence of the mud, in which her bottom is dragging, when approaching a sail-vessel in the night-time, in a narrow channel, nearly end on, with a combined speed of at least nine knots, is bound to slacken her speed.

#### In Admiralty.

*A. A. Strout*, for the San Carlos.

*Frank Goodwin*, for the Blenheim.

NELSON, D. J. These are cross-libels for damage by a collision between the British steamer Blenheim and the American brigantine San Carlos, which occurred between 7 and 8 o'clock p. m. of the twenty-ninth of October, 1878, off the mouth of the Demerara river, British Guiana. At the entrance of the river on the easterly side is a light-house, and about 12 miles distant from the light-house, and bearing N. N. E.  $\frac{1}{2}$  E. from it, a light-ship is anchored. The course

between the light-house and the light-ship marks the line of the channel for sea-going vessels across the bar, which extends out some miles into the ocean from the mouth of the river, and the place of the collision was about midway of this channel. The wind was E. by N., blowing a fresh breeze and baffling a point or two; the night was dark, the weather fine and clear, and the water smooth. The channel where the collision occurred was about half a mile in width. The San Carlos, of the burden of 413 tons, and drawing 16 feet and 2 inches, and loaded with 580 tons of coal, was proceeding on a voyage from Glasgow to Georgetown, on the Demerara river. The Blenheim, a large sea-going steamer, drawing 17 feet and 2 inches, had just left the port of Georgetown and was bound for England. Both vessels had their regulation lights set and burning. In the collision the stem of the Blenheim struck the San Carlos on the starboard side at the fore-rigging, cutting her down to the water's edge and causing her to sink immediately. As the San Carlos lay on the bottom after sinking, her bow was pointed about S. E. She was afterwards blown up to clear the channel from the obstruction of the wreck. The injury to the steamer was slight, and mostly on the port side of the stem. The depositions of the pilots who were on board of the two vessels have not been taken in the case.

The evidence on the part of the San Carlos comes from the depositions of all the officers and men who were on board at the time of the collision. From these it appears that the San Carlos arrived at the light-ship at 5 in the afternoon, and took a pilot and proceeded on her voyage towards the mouth of the river; that her course after leaving the light-ship was S. W. by S.  $\frac{1}{2}$  S., the wind blowing on the port quarter; that about 7 o'clock the lookout saw a little on the starboard bow the light of the steamer coming out of the river and reported the same to the pilot, who thereupon caused the San Carlos to luff a half a point, and she afterwards continued on that course, S. S. W.; that in about 20 minutes after the steamer was first discovered, being still on the starboard bow of the San Carlos, the steamer suddenly ported her helm and run directly across the track of the San Carlos, which was proceeding under full sail; that when the collision had become imminent, by order of the pilot the fore-yards were hauled back and the peak of the mainsail dropped for the purpose of deadening her way, but that no change of helm or of course was made up to the time of the collision.

The evidence for the Blenheim is contained in the depositions of her master, her first and second officers, and her engineer. The case

made for the Blenheim, upon the depositions of her master and her first and second officers, is that she left the wharf at Georgetown at 6 p. m. A short time after passing the light-house, the course of the steamer being between N. N. E.  $\frac{1}{2}$  E. and N. E. by N., the two lights of the San Carlos were observed about two miles off, a little on the port bow, and the pilot then gave the order to put the helm to port. When within about a half a mile of the San Carlos, seeing that the steamer moved sluggishly under the port helm, owing to her dragging in the mud on the bar, and still seeing the two lights of the San Carlos on the port bow, the pilot ordered the helm to be put hard a-port; that immediately afterwards the San Carlos was observed shutting in her red light, and the pilot called out, "Hard a-port—is the helm hard a-port?" and gave the order, "Full speed astern;" that the San Carlos still came on, showing only her green light, and it could then be seen that the San Carlos had luffed and hauled her foreyards aback, and immediately after this the vessels came together.

Upon examining carefully the depositions in the case I see no reason to doubt the substantial accuracy of the case made by the San Carlos. The examination of her officers and men was full and complete; nothing appears in their depositions to throw discredit on their story, or to show any fault on their part. They all agree that no change of course was made previous to the collision, and that the hauling in of the port braces was after the collision had become apparently inevitable, and that the object of the maneuver was only to lessen the headway. On the other hand, several facts appear in the depositions of the officers of the Blenheim which indicate an absence of that degree of care which they were bound to exercise. The chief officer, who was on the lookout, swears that he saw the lights of the San Carlos when two miles distant, but did not report to the pilot until the red light was shut in and the vessels were not more than half a mile apart. His excuse is that he heard the first order of the pilot to port the helm, and supposed the pilot saw the lights as soon as he did. The master, who was on the upper bridge with the pilot, says that both he and the pilot saw the lights when two miles away, and that the first order to port was given in consequence of their seeing them. But it is left to conjecture, upon the evidence, whether the pilot continued to observe the lights until the report of the lookout. For all that appears, he was depending upon the lookout to keep them in sight and report to him. Such a failure of duty on the part of the lookout being shown, the steamer is bound to prove clearly that this neglect could not have contributed to cause the disaster.

Again, it appears that owing to the retarding influence of the mud, the combined effect of the first order to port and the second order to hard a-port was only to alter the course of the steamer about three points. A steam-vessel so little under the control of her helm as this one was, approaching a sailing vessel in the night-time, in a narrow channel, nearly end on, with a combined speed of at least nine knots, was bound to slacken her speed. The Blenheim continued at full speed until almost the moment of collision, and the first order to the engineer was "full speed astern." So slight was the change of course of the steamer that both lights of the brigantine continued in sight from the time they were first sighted until the vessels were within a half a mile of each other. Such conduct seems to me, under the circumstances, to have been gross negligence.

It is insisted on the part of the Blenheim that she struck the barkentine at right angles with the latter's hull, and that this proves a change of course by the barkentine. If the fact were proved, I think the conclusion would follow, since the two vessels were sailing on very nearly opposite courses in the line of the channel, and the change of the steamer under the operation of her port helm was only three points, if the blow was a square one, the sailing vessel must have changed her course from two to three points. But I do not think the fact is proved. The position of the San Carlos, as she lay on the bottom, six points off her sailing course, is fully accounted for as the effect of the steamer's blow at her fore-rigging, and the injuries on the port side of the steamer's stem cannot overcome the testimony of the officers and crew of the San Carlos that the blow drove her across the channel. I am of the opinion that the preponderance of the evidence proves that the San Carlos kept her course, and that the disaster was caused by the fault of the Blenheim in running across her bows.

Both the libel and the answer of the owners of the Blenheim contain averments as to the laws of British Guiana in relation to compulsory pilotage. No proofs were offered to sustain them, and they were not relied on at the hearing. In the case against the owners of the San Carlos the libel is to be dismissed with costs; in the case against the Blenheim there is to be an interlocutory decree for the libelants. Ordered accordingly.

CANFIELD v. MINNEAPOLIS AGRICULTURAL & MECHANICAL ASSOCIATION  
and others.\*

(Circuit Court, D. Minnesota. January 20, 1883.)

1. CORPORATION—STOCK—PLEGDED AS COLLATERAL—SALE OF.

When stock is pledged as collateral security by delivery of the certificates with blank transfer on the back, signed by the owner, and the principal indebtedness is past due, the pledgee can sell the stock as the readiest mode of collection, giving the pledgeor and his successor in interest reasonable notice to redeem, and of the time and place of sale.

2. SAME—ABSOLUTE OWNERSHIP—HOW ACQUIRED.

The pledgee, a bank, improperly purchased the pledge through an agent. *Held*, that nothing passed by such form of sale, and the bank still holds the pledge by its original title as collateral security, and only a *bona fide* purchaser from the bank could subsequently acquire absolute ownership of the stock.

3. SAME—RECOVERY OF LAND REPRESENTED BY THE STOCK.

When the pledge is stock of an association, having no other corporate property than real estate, *held*, that the complainant, who had succeeded to all the rights of the original pledgeor, could recover the land by a suit in equity, on reimbursing the grantees, who obtained their title with notice of his rights and equities, the amount they are actually out of pocket.

4. SAME—ACCOUNTING OF RENTS, PROFITS, AND INCOME.

To arrive at such sum an account must be had of rents, profits, and income received by such grantees while in possession of the real estate.

In Equity.

The complainant, a citizen of Vermont, in 1877 brought this suit in equity against the defendants, citizens of Minnesota, and in November, 1880, an amended and supplemental bill was filed, praying the court to confirm the title in him to certain shares of stock of the defendant association, and also the title to all the land which the stock represented, except five acres, and issue was joined.

The facts found are these:

In June, 1871, the defendant, the Minneapolis Agricultural & Mechanical Association, was organized under the laws of the state of Minnesota as a body corporate, and its chief business was the holding of fairs and other public exhibitions. The capital stock was \$40,000, divided into 800 shares, of \$50 each, and the corporation subsequently acquired the title to 70 acres of land situated in the county of Hennepin, in this district, described as follows, to-wit, the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 36, in township 29, of range 24, and the W.  $\frac{3}{4}$  of the N. E.  $\frac{1}{4}$  of the same section.

Previous to August, 1873, five acres of this tract had been transferred to the Minneapolis Harvester Works, for which no claim is asserted. The association held no corporate property other than the real estate above men-

\*See 7 Sup. Ct. Rep. 387.

tioned, and prior to April, 1873, William S. King had become the owner of the 800 shares representing the entire capital stock.

On November 5, 1872, King purchased 200 shares of this stock from George A. Brackett, and gave his notes in the sum of \$14,000, due one year from date, for the purchase money, and Brackett retained the stock in pledge for payment. On November 12 of the same year King also purchased from R. J. Mendenhall 100 shares of the stock for \$6,250, giving his notes for the purchase money, and this stock was held in pledge for their payment. In September, 1873, Brackett borrowed, on his note, \$10,000 from the State National Bank of Minneapolis, and turned over as collateral security the King notes for \$14,000, and repledged the stock accompanying them, and about this time the bank also took from Mendenhall the King notes for \$6,250, and the 100 shares of stock pledged therewith. The pledge of the stock, in all instances, was made by a delivery of the same with blank transfer indorsed on the certificates, signed by the party to whom they were issued. King's title to the 800 shares of stock was obtained by such delivery to him, and no transfer was made upon the books of the corporation.

On July 19, 1873, King pledged the remaining 500 shares to R. J. Baldwin, at that time cashier of the said State National Bank, to secure him personally for the return of \$10,000 cash then loaned by him to King, and King also authorized Baldwin to hold these shares as further security for his notes to Mendenhall and Brackett, then held by the bank. The transfer of this stock was also made by delivery of the certificates as above mentioned.

On August 14, 1873, the complainant in good faith, without notice of the stock being pledged, purchased of King the real estate above described, being all the corporate property of the association, and the following agreement in writing was executed:

"I will sell to Thomas Canfield the property known as the fair grounds, in Minneapolis, (excepting five acres subscribed to the stock of the Minneapolis Harvester Company) for the sum of \$65,000. I will receive in payment therefor \$65,000 of the 7.30 gold bonds of the Northern Pacific Railroad Company, at the rate of 90 cents on the dollar, and the balance in the notes of hand of the said Canfield, payable in equal installments one, two, and three years from date, with interest at the rate of 10 per cent. per annum. In case the said Canfield shall, at the end of one year from date, prefer to have said notes surrendered, and in lieu thereof allow me one-half the profits from the sale of said property, after paying back to said Canfield the sum of \$59,500, together with interest upon the same at 10 per cent. per annum, and all taxes and expenses incurred in improving and managing the property, then I am to surrender said notes, without interest. This proposition is based upon the supposition that there are 70 acres in said tract before deducting the five acres before mentioned. In case there is not so much the consideration to be in proportion. I am to procure abstract of title and perfect the same, and execute a warranty deed at as early a day as possible. All buildings and other materials to go with the land except the building sold to the harvester company.

"August 14, 1873.

W. S. KING.

"I accept the above proposition and will pay as provided in the foregoing agreement when the proper deed is delivered.

"August 14, 1873.

THOMAS H. CANFIELD."

King, without informing the complainant that this stock was pledged, verbally agreed to transfer the stock to complainant and procure a deed to him from the association. In order to carry out his agreement, King procured a deed to be executed by the several directors, in form, one of bargain and sale, purporting to be a conveyance of the real estate by the association to the complainant. This deed is signed as follows:

"THE MINNEAPOLIS AGRICULTURAL & MECHANICAL ASSOCIATION. [Seal.]

"By" [Director's signatures.]

Among those signing as directors are the defendants Dorilus Morrison and George A. Brackett.

The sale of the property was not authorized at any meeting of the board of directors, nor was the deed directed to be executed, or the corporate seal authorized to be attached thereto, at any meeting of said board; and this conveyance was declared void and of no effect as against the bank by the supreme court of the state of Minnesota in a suit between it and complainant.

On September 12, 1873, at the city of New York, King delivered to Canfield this deed, together with a warranty deed of the same property executed by himself, and an abstract of title, but did not transfer any of the said 800 shares of stock. At the same time complainant delivered to King \$65,000 in Northern Pacific bonds, and further complied on his part with the terms of the agreement. These deeds were duly recorded October 4, 1873.

On July 16, 1877, no part of the King notes to Brackett and Mendenhall had been paid except two years' interest on the Mendenhall notes and on Brackett's note, which was then past due—\$7,000.

The gas stock had then been returned, and the bank held all the 800 shares of stock pledged for the payment of the King notes and the balance due upon Brackett's note. The bank's claim being \$13,000, it proceeded to sell the 800 shares pledged, and gave public notice of the time and place of sale, and also served personal notice on King and the complainant. After several adjournments, the entire 800 shares were offered by the auctioneer and struck off and sold to one James M. Knight, on his bid of \$13,000, which was made and the amount of the bid paid as follows: The State National Bank was in process of liquidation, and the King and Brackett notes, among others, had been placed in the control of Baldwin, who had retired as cashier, but was still a stockholder and had the charge of the sale of the pledged stock. Baldwin, just before the sale, informed Harrison, the president of the bank, that it was necessary to have some one bid to the amount of the bank's claim, \$13,000, and gave him a memorandum of the computation. Harrison immediately requested his son-in-law, Knight, to attend the sale and bid that amount. Knight had no money, and so informed Harrison, but the latter told him that he could give his check on the State National Bank for the amount, and when Knight said "The bank will not take the check," he replied, "Perhaps it will if I indorse it." Knight paid no money at the time, and the check never was returned to him, nor did the stock pass from the control of Baldwin.

It is not clear that Harrison's check was charged up against him, although he was the largest stockholder and had some \$80,000 on deposit; but the amount of the check was subsequently paid as hereafter stated. Shortly

afterwards, Morrison gave his notes to Knight for the aggregate amount of \$12,430.42, and nine-tenths of the 800 shares of stock were, by a written agreement, transferred to him. Baldwin drafted the agreement and had charge of the shares of stock at that time, and arranged the manner in which Knight's one-tenth interest should be noted on the stock, signing Knight's name (per Baldwin) upon one of the certificates, by which his interest therein could be ascertained. The Morrison notes were given Baldwin, who took them in part payment of Knight's check, leaving a balance still due.

After this transaction a meeting of stockholders of the association was held and new directors were elected who resolved to sell and to deed the corporate property to Morrison and Knight, and on February 23, 1878, the association made, executed, and delivered a deed of an undivided nine-tenths of said lands to Morrison, and one-tenth of the same to Knight. Morrison knew, when the agreement of sale for the stock was entered into, all about the transaction between King and complainant, and had executed, as director, a conveyance purporting to be a deed of the corporation to perfect the title. He also agreed to pay the expenses incurred by the bank and Baldwin in a litigation between them and the complainant about the stock and the land, which were not a lien on the stock, and for the payment of which Knight was not liable. The Morrison notes were held by the bank, and not paid except as stated hereafter.

A fair was held on these grounds in 1878, which proved a financial failure, and, on an appeal to the citizens of Minneapolis, \$30,000 was raised to pay up the deficiency and relieve the real estate from Morrison's claim. Out of this fund the Morrison notes were paid, partly in cash and partly in individual notes, among which was Morrison's for \$3,000, the amount of his subscription.

It was the understanding between the citizens who subscribed and Morrison that his interest in the land was only an incumbrance upon nine-tenths thereof, and he conveyed such interest to Sidle and Langdon, October 22, 1878, who declared a trust to most of the subscribers to the fund. Sidle and Langdon knew of the complainant's equity and the pending litigation, and that Morrison's interest was regarded by him as an incumbrance only. King, the original pledgeor of the stock, had possession of the real estate for the purpose of holding fairs and exhibitions for the years 1877, 1878, 1879, and 1880.

*E. C. Palmer and Chas. E. Flandrau, for plaintiff.*

*Wilson & Lawrence and Morrison & Van Norman, for defendants.*

NELSON, D. J. Upon the facts, as I understand them, the question presented is not difficult of solution, although the transactions are somewhat complicated. The State National Bank, on July 16, 1877, held as collateral security for the payment of King's notes the 800 shares of stock which represented the entire corporate property of the Minneapolis Agricultural & Mechanical Association, comprising 70 acres of land, and had a right to sell the pledged stock, all the notes being past due and unpaid. It proceeded to give reasonable and proper public notice of the time and place of sale, and specially notified the pledgeor and the complainant, who had succeeded to all his



interest therein. At the sale the stock was struck off to Knight, the son-in-law of the president of the bank, who had been requested to bid the amount of the bank's lien—\$13,000. It is very clear this bid was for the benefit of the bank, and was so regarded by the president and its agent, Baldwin. The conduct of Baldwin in subsequent transfers of the stock after the sale can be accounted for in no other satisfactory manner. He drew the agreement of sale to Morrison of nine-tenths of the stock, providing for the payment of the expenses of certain litigation incurred by the bank and himself, for which Knight was not liable, and by *memoranda* upon one of the certificates designated the number of shares therein reserved under the sale to Morrison, signing thereto Knight's name, which indicates that he had not parted with the control of the stock.

There is no clear and certain testimony that Knight ever had anything to do with the pledged stock or the corporate property, except in connection with Baldwin, who represented the bank. Knight testifies that "Harrison or Baldwin delivered the stock to him at his store about the time he purchased." Harrison says: "I don't know to whom the stock was delivered after it was bid off. Baldwin attended to these matters as agent of the bank." "He (Knight) never paid any money to me on account of that bid. I don't know what he did outside of that." Baldwin says: "I had nothing to do with the receiving or application of the proceeds of the sale. \* \* \* I made the sale and turned the matter over to the proper officer of the bank." On his subsequent examination it is assumed that he had previously testified that he delivered the stock, and he then states that Knight had the stock for a long time. It is clear, however, that it never passed entirely from Baldwin's control, even if it was in Knight's possession. Knight paid no money at the time of the sale, but gave his check on the bank where he had no deposit, at the request of Harrison, who indorsed it, and this check was accepted by the parties in interest. It is uncontroverted that neither Baldwin, Knight, nor Harrison knew what became of this check. Dean, who was the cashier at the time of the sale, is of the impression that the check was entered upon the books as proceeds of the sale, but it is evident, from an examination of his whole testimony, that he knows nothing certain about it. The conclusion is irresistible that the bank was the purchaser, and it is elementary law that nothing passed by such form of sale and it still held the stock under its original title as collateral security. After the sale Brackett's note was returned to

him, together with King's notes for \$14,000, which had been pledged for its payment; but this cannot change the situation. The complainant's right to redeem from the bank or set aside the sale after such form of foreclosure is not doubtful. Has anything subsequently transpired which will prevent him from asserting his equitable right to the corporate property?

2. Dorilus Morrison, who was one of the original directors of the association, purchased, as he says nine-tenths of the stock from Knight. He had previously as such director executed a deed to the complainant, purporting to convey on behalf of the association the corporate property. He knew all about King's sale to complainant, and executed this deed at his instance, in order, if possible, to perfect the title. When the agreement for sale between him and Knight was signed, Baldwin, the agent of the bank, was present, drew up the bill of sale, and managed the transfer and delivery of nine-tenths of the stock, in which Morrison agreed to pay the liability of the bank incurred in litigation about the stock, which was neither a lien nor a condition of sale imposed by Knight. His conduct subsequently in connection with the stock and the corporate property clearly shows that he never regarded his interest any more than a lien for the protection of advances made by him. In fact, he paid no money to Knight, but when the agreement was executed gave his notes for \$12,430.42, which Knight turned over to Baldwin, and these notes were subsequently paid out of a fund subscribed by certain citizens of Minneapolis. He was a purchaser with notice, and his right to hold the stock as against the complainant is no better than Knight's or the bank's. The conveyance by the association to Knight and himself of the entire corporate property did not change his relation to the complainant. It virtually dissolved the corporation, but the grantees acquired no right thereto superior to that they before possessed.

3. The trustees, Sidle and Langdon, are not *bona fide* purchasers for value. They knew all about the property—its complications, and the previous and pending litigation. Their desire was to make up the deficiency resulting from the fair of 1878, which was a failure financially, and at all the conferences between citizens who afterwards subscribed to the fund of \$30,000 to pay off debts, it was understood that Morrison, who was present and participated in these meetings, only desired that his notes, then outstanding, should be provided for, and that he would deed the property for about \$14,000, which was the amount then due thereon. In fact, the representation of King to

Sidle and others of the deficiencies due embraced this item of \$14,000, and the declaration of trust by Sidle and Langdon speaks of incumbrances, which, in my opinion, refers to the Morrison interest.

4. While Sidle and Langdon took the title to the land with notice of the complainant's equity, and could not by a declaration of trust affect it, yet the complainant in my opinion is liable to them for the money actually paid Morrison for his interest, which was \$8,646.55, and they must account to him for any income, profits or advantages derived from the use of the property.

My conclusion is that complainant is entitled to a decree in his favor requiring James M. Knight, upon the payment to him of the sum of \$569.58, to execute to the complainant a conveyance of one-tenth of the said real estate, and Jacob K. Sidle and Robert B. Langdon to account for the rents, profits, and income of said real estate while in their possession, and to pay over to complainant the excess, if any there be of the same over and above said sum of \$8,646.55, and to convey nine-tenths of said real estate to complainant. But in case said sum of \$8,646.55 shall exceed such rents, profits, and income, then to execute such conveyance upon the payment of the balance to them by complainant. And that upon the failure of the said Knight to execute such conveyance within 10 days after the payment or tender to him by complainant of said \$569.58, that such decree stand as a conveyance. And upon the failure of said Sidle and Langdon to make such accounting within 10 days after the service of notice on them to appear before the master for such purpose, or to execute said deed within 10 days thereafter, or after the payment or tender to them of the excess of said sum of \$8,646.55, over said rents, profits, and income, in case there is an excess, that such decree stand as a conveyance from them.

The case will be referred to H. E. Mann, as master, to take the accounting provided for. Let a decree be entered accordingly.

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FERRY v. BURNELL and others.

(Circuit Court, D. Kansas. January 8, 1883.)

1. MORTGAGE—PRIORITY OVER UNRECORDED DEED.

A recorded mortgage of the widow's interest in real estate of which the husband died seized, takes precedence of a prior unrecorded deed made by the husband and wife in his life-time, and of which the mortgagee had no notice.

**2. ESTATES OF DECEASED—WIDOW'S PORTION OF REAL ESTATE**

One-half in value of said real estate, secured to the widow by the statutes of Kansas, is equivalent to an undivided one-half before partition made.

**3. SAME—AUTHORITY OF WIDOW TO MORTGAGE.**

The widow may mortgage or convey her interest in said real estate, as an undivided one-half, before it is set apart to her by the probate court.

*Rossington, Johnson & Smith*, for complainant.

*Leland J. Webb*, for defendant Ingham.

FOSTER, D. J. The question involved in this case, which comes up on the complainant's demurrer to defendant Ingham's cross-bill, is one of superior title to a part of the land included in complainant's mortgage. In July, A. D. 1877, Henry R. Dunham and Fidella Dunham, his wife, (now Fidella Burnell, one of the defendants in this cause,) conveyed to Thomas J. Ingham the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$ , and lot one in section 17, township 9 S., of range 4 E., in Clay county, by deed of general warranty. This deed was not recorded until December 31, 1878. In the mean time Henry Dunham died in September, 1877, leaving his widow Fidella, and two minor children, surviving. In February, 1878, and before the widow's interest in the estate had been set apart, she executed the mortgage in suit herein, and, among other real estate, included in said mortgage an undivided half interest in the real estate before sold to Ingham, which mortgage was filed for record April 6, 1878, being long before the Ingham deed was filed for record, and of the existence of which deed the mortgagee had no notice. The question is as to priority or better title to the wife's interest in the land in controversy. The statute of Kansas (chapter 33, § 8) provides as follows:

"One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property in fee-simple, upon the death of the husband, if she survives him."

The recording act (chapter 22, § 21) reads as follows:

"No such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

This section is more comprehensive and sweeping than the recording act of 1862. That provided that the instrument should not be of any validity against *subsequent purchasers for a valuable consideration* without notice, etc. The present statute makes the deposit of the instrument with the register of deeds essential to its validity as

against parties not having actual notice of its existence. To all parties not having such notice, it is invalid and of no effect. There seems to be no way of escaping the conclusion that, so far as this mortgagee is concerned, and as to any rights he may have acquired under the mortgage, the conveyance to Ingham, of which he had no notice, cannot intervene. As to him it had no validity. It is urged by counsel for Ingham that, under the statute of descents and distribution before cited, there was nothing to descend or to set apart to the widow in this land, as she had conveyed all her interest away before her husband's death. As a matter of fact, that is true; so it would have been equally true that Dunham and wife, after the deed to Ingham, had no interest in the land to convey, and yet if they had afterwards made a conveyance of the land to a *bona fide* purchaser having no notice of the Ingham deed, the transfer would have held good. The law conclusively presumes title in such cases to be in the grantor, where the rights of innocent parties are concerned.

There have been several adjudicated cases as to the relative rights of an innocent purchaser of real estate from an heir or devisee, and one holding an unrecorded deed made by the ancestor in his lifetime; and it has been decided in Kentucky and Connecticut (4 Mon. 120; 6 B. Mon. 531; 24 Conn. 211) that the unrecorded deed of the ancestor took precedence of a recorded deed from the heir or devisee of the grantor. They put it upon the ground that the statute only makes void unrecorded conveyances as to subsequent purchasers from the same grantor, and not from his heirs or devisees. That reason would lose much of its force in this case, for this mortgagee holds whatever right he has under one of the grantors in the Ingham deed, and not from an heir or devisee; and, besides, the Kansas recording act does not make the instrument invalid alone as to subsequent purchasers, but to all parties not having actual notice. The cases referred to, however, are overborne by the weight of authority and sound reason. In *Kennedy v. Northrup*, 15 Ill. 155, this question is fully discussed by Judge CATON, delivering the opinion of the court, and citing *McCulloch v. Endaly*, 3 Yerger, 346, and *Powers v. McFarren*, 2 Serg. & R. 44. In the Illinois case the court say: "In case of his [the ancestor's] death, the heir becomes the apparent owner of the legal title, and it is equally important and equally just that the public may be allowed to deal with him as with the original grantor if living." The rule established in the Illinois case has been followed in Missouri. *Youngblood v. Vastine*, 46 Mo. 241. If this is true of an heir or devisee who is in no manner a grantor in the unrecorded

deed, and whose signature is not required to divest the grantor's title, *a fortiori* it must be true of the wife, who must have joined in the deed to convey a perfect title, and who could not be deprived of her interest in the land without her consent, except when sold on judicial sale. The statute of Kansas, on the death of the husband, vests the title of one-half in value of all the real estate of which he was seized at his death in the wife, subject, however, to debts existing against the estate. This is a provision for the wife in lieu of dower, and it becomes a vested right on the death of the husband.

The statute says *one-half in value* shall be set apart. What is the widow's interest before it is set apart? I should say it is an undivided one-half. The words "in value" are used in the statute to negative the idea that it might be one-half in area that is to be set off to the widow. From all that appeared on the record, at the time this mortgage was made, Mrs. Dunham was the owner in fee of the undivided half of this real estate, subject to the payment of any debts of the husband not liquidated by the personal estate, and which interest remained to be set apart to her under the direction of the probate court. On this apparent state of facts the mortgagee had the right to act; and I know of no reason why the widow may not convey all her title and interest in the land without waiting until it is divided or set apart to her.

The demurrer to cross-bill must be sustained.

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UNITED STATES *v.* STURGIS and another.

(District Court, S. D. New York. January 27, 1883.)

LIEN OF JUDGMENT—SUSPENSION OF LIEN—STATE PRACTICE—MODIFICATION.

Under sections 914, 915, and 916 of the Revised Statutes, in common-law actions the district court has power to suspend the lien of a judgment upon lands of the judgment debtor during appeal or writ of error, and to cause the docket of the judgment to be so marked, in accordance with the provisions of the state practice. The lien of a judgment upon lands of a judgment debtor, depending upon the state statutes and practice as adopted under the United States laws, may be modified or suspended in accordance with the state practice, in the discretion of the court.

*E. B. Hill*, Asst. Dist. Atty., for the United States.

*Thos. Harland*, for defendants.

BROWN, D. J. A judgment having been recovered in the above action in favor of the plaintiff, and a writ of error having been

taken therefrom to the circuit court, and due security given for the payment of the judgment, if affirmed, application is now made for an order of this court suspending the lien of the judgment of this court upon the lands of the judgment debtors during the pendency of the appeal, and that the docket be so marked, in accordance with the provisions of section 1256 of the New York Code of Procedure. The attorneys on both sides and the sureties have consented, in writing, to the entry of such an order; but if the court has no power to make such an order, it should not be signed, even upon consent; for, if void, it might greatly injure third persons who might rely upon and be misled by it.

In the case of *Meyers v. Tyson*, 13 Blatchf. 242, it was held that the court had no power to make such an order. But that was the case of a decree in equity, and not of a judgment in a common-law action.

From the opinion in the case of *Masingill v. Downs*, 7 How. 760, and the review of the authorities therein, it seems that the lien of the judgment upon the lands of the judgment debtor, in the absence of any express statute of the United States creating such a lien, is sustained as a necessary incident of the right to issue execution and sell lands thereunder, in accordance with the laws and the practice of the several states, and the various statutes of the United States adopting those laws, and the process and modes of proceedings in the several states.

In *Wayman v. Southard*, 10 Wheat. 32, MARSHALL, C. J., says that the phrase "forms and modes of proceedings" in the act of 1792, the same phrase which is used in section 914 of the Revised Statutes, is designedly used in distinction from the words "writs, executions, and other process;" and that it "embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has already been shown not to take place till the judgment shall be satisfied." See, also, *Beers v. Haughton*, 9 Pet. 359, and *Ex parte Boyd*, 105 U. S. 647.

When, therefore, by sections 914, 915, and 916 of the Revised Statutes, it is provided that the practice, pleadings, "the forms and modes of proceedings" in common-law actions, the remedies by attachment or other process as well as "the remedies by execution or otherwise, upon judgments in common-law actions, shall be the same as are now provided in like causes by the laws of the state in which the court is held, or by such laws hereinafter enacted which may be

adopted by general rule of the circuit and district courts," it seems to me that the modification or the suspension of a judgment lien during appeal must be held to be embraced within the scope of these general provisions, not only as a "mode of proceeding" in the suit, but as one of the means of making the judgment effectual—that is, as a part of the remedy thereon—by "execution or otherwise," and therefore subject to the discretionary power of the judges of the district and circuit courts in common-law actions to grant an order suspending the lien during appeal, in accordance with the state practice. If the lien had any other foundation than the laws and practice of the states themselves, it might be different; but as that is its foundation, it must be subject to such changes, modifications, and discretionary powers as are from time to time made or conferred by the laws and practice of the several states, when these are adopted by rule under sections 914 and 916.

In December, 1881, this court and the circuit court, by general rules, adopted all the provisions of the state practice and of the Code of Procedure in existence on that date, so far as the same might be applicable in common-law actions to remedies or judgments, and they thereupon became the law of this court. 19 Blatchf. 573; *Beers v. Haughton*, 9 Pet. 360; *Bank of U. S. v. Halsted*, 10 Wheat. 51, 61.

The present application is in pursuance of section 1256 of the New York Code as then existing. The relief provided by this section is of great practical benefit. Without it, judgments during appeal, though fully secured, are liable to become oppressive embarrassments in transactions in real estate. The remedy has been carefully matured in the state practice, so as to guard against abuses, by the experience of many years, and by legislative amendments. The order seems to me to be within the power of this court to grant, under the statutes and rules above referred to; and, being consented to, it should, therefore, be granted.

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CLARK v. BLAIR.

(Circuit Court, D. Nebraska. January, 1883.)

1. EQUITY PRACTICE—MODIFYING INTERLOCUTORY DECREE BEFORE FINAL DECREE.

It is competent for the court, at any time before the final decree has been signed, to reconsider, modify, or set aside any of the interlocutory rulings or orders made in the course of the proceedings.



**2. FORMER SUIT AS A BAR.**

The judgment in a former suit based upon the same facts, or between the same parties or their privies, but to enforce a different demand and obtain another form of relief, is conclusive only as to what was in fact litigated and decided in such suit.

**3. SAME—EVIDENCE AS TO POINT DETERMINED.**

Where the record is silent, evidence is admissible to show what was actually litigated and determined in the former suit, and in the absence of such evidence the former adjudication is conclusive only as to questions which were necessarily tried and determined therein.

**4. SAME—DIFFERENT PROOFS.**

If different proofs be required to sustain the two actions, a judgment in one of them is no bar to the other.

**5. EVIDENCE—TAX RECEIPTS.**

Where the burden is upon a party to show payment of taxes, for which lands were legally liable, tax receipts alone are not sufficient.

**In Equity.** On exceptions to master's report.

This is a bill in equity brought to set aside and cancel certain tax deeds executed by the county of Cuming, through its treasurer, to the respondent. At the hearing upon the final proofs the court held that the tax sale and deed complained of were void, and that the plaintiff was entitled to the relief sought, but not until he should pay or tender to respondent such legal taxes as the latter has paid upon the land in controversy. The case was accordingly referred to the master to ascertain and report the amount of the legal taxes so paid by the respondent. It was insisted on the former hearing that a decree of the district court of the state of Nebraska, in the case of the *Nebraska Land & Imp. Co. v. John J. Blair and John Klope, County Treasurer*, which decree was pleaded in bar and offered in evidence, was, in law and in equity, an adjudication of the issues between the parties in the present suit. This defense was overruled at the former hearing, and has been renewed and elaborately reargued. Besides this defense, certain questions arising upon the report of the master, and fully stated in the opinion, are now to be considered.

*E. Estabrook*, for complainant.

*J. C. Crawford* and *J. M. Woodworth*, for respondent.

McCRARY, C. J. Although the defense of the former adjudication was raised, considered, and passed upon at the hearing upon the proofs, yet the same question may be again considered upon exceptions to the master's report. It is competent for the court, at any time before the final decree has been signed, to reconsider and modify or set aside any of the interlocutory rulings or orders made in the course of the proceeding. The final hearing in such a case as this is

when exceptions to the master's report are considered and passed upon, and if the court is then of opinion that in any of its previous orders it has committed errors, the same may be corrected. *Fourniquet v. Perkins*, 16 How. 82.

I have accordingly reconsidered, in the light of the thorough reargument of counsel, the question whether the former decree relied upon by respondent is a bar to the present suit.

Although the parties are not identical, I assume that in legal contemplation the parties to the present suit are bound by the former adjudication to the same extent as if they had all been parties to that proceeding. The former suit, however, was brought to obtain a different remedy and secure a different relief from that which is sought in the present case, although the relief sought in the two cases was predicated upon the same facts. The former suit was brought before the tax deed was executed, and for the purpose of enjoining its execution, while the present suit is instituted after the execution of the tax deed, for the purpose of having the same set aside as fraudulent and void. For the purposes of this question, we may say that the present is a suit based upon the same facts, or between the same parties or their privies, but to enforce a different demand and obtain another form of relief. It is, therefore, not a case in which the parties are conclusively bound by all that might have been litigated in the former suit. They are conclusively bound only by what was in fact litigated and decided. *Cromwell v. County of Sac*, 94 U. S. 351.

The record of the former suit shows that the bill was dismissed. It shows nothing more, but the court will undoubtedly presume that it was dismissed, because the court held upon some ground that the complainant had failed to make out a case for relief. In such a case it is no doubt competent to prove, by evidence *aliunde* the record, what questions were in fact contested and decided, if under the pleadings numerous questions might have been litigated, and the case might have turned upon any one of several questions. We are, however, in the present case left to the consideration of the pleadings and decree of dismissal alone. From these we are asked by the respondent to assume that the state court decided the taxes in question to be legal, notwithstanding the matters alleged in the bill, and that the sale for said taxes was valid, so that the purchaser would acquire a good title. All this we must assume in order to hold that the former adjudication is a bar to relief here. We should be very reluctant to assume this, since to do so would be to declare that the state court in the former suit held that a tax sale may be valid, notwithstanding

the grave irregularities, not to say frauds, alleged in the bill and shown by the proofs in this case. As we have said, where the record is silent, evidence is admissible to show what was actually litigated and determined in the former suit. In the absence of such evidence we can consider the former adjudication as conclusive upon the parties in the present suit only as to questions which are common to both suits, and which were necessarily tried and determined in the former. Such is the doctrine laid down by the supreme court of the United States in the case of *Packet Co. v. Sickles*, 5 Wall. 580, where Mr. Justice NELSON, speaking for the majority of the court, said:

"But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

Upon looking at the record of the former suit, we discover that the defendants therein alleged in their answer as follows:

"And this defendant says that by reason of the premises, and because the said petition of the plaintiff shows neither the payment of said several sums of money and interest, nor contains any offer to pay the same, or any sum of money whatever, in redemption of the said lands from the said tax sale, or in discharge of the lien aforesaid of this defendant thereon, that the same is wholly insufficient to sustain the claim for relief therein prayed for by the plaintiff, or to sustain this suit or action against this defendant, or any suit whatever. And this defendant, having now answered the said petition as fully as he is advised that it is material that the same should be answered, asks to be dismissed hence, with his costs."

This paragraph of the defendant's answer in that case, taken in question with other allegations showing that defendant had paid certain legal taxes upon the lands in controversy, constituted, under the decisions of the supreme court of Nebraska, a complete defense. *Hallenbeck v. Hahn*, 2 Neb. 426, 427; *Railroad Co. v. York Co.* 7 Neb. 495; *Wood v. Helmer*, 10 Neb. 75; *Southard v. Dorrington*, Id. 122; *Hunt v. Easterday*, Id. 166; *Boeck v. Merriam*, Id. 201.

Some of these cases also hold that equity will not interfere by an injunction to restrain the execution of a tax deed which, if executed, would be void, on the ground that the remedy at law in such a case is adequate. It is apparent therefore, that the district court of Nebraska may have dismissed the bill in the former suit upon either of these grounds, without considering at all the question of the validity of the tax sale, then and now in controversy. And it is also apparent that it was not at all necessary for that court to pass upon the question of the validity of said sale. Under such circumstances we will presume

that it did not do so. We must hold that the former adjudication is no bar to this action for another reason. The law is well settled that if different proofs be required to sustain the two actions, a judgment in one of them is no bar to the other.

"If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result." *Freem. Judgm.* § 259. That the evidence in this case is sufficient to entitle complainant to relief has already been decided. That it would not have availed the complainant in the former action is clear from what has already been said. The suit was to enjoin the execution of a tax deed, and the court was bound by the decisions of the supreme court of Nebraska, according to which the bill was fatally defective in not alleging an offer to pay legal taxes, and in showing a case where there was a complete and adequate remedy at law. The proof now relied upon would have been properly excluded in the former case, or, if admitted, would have availed the complainant nothing, because, in that case, there was no offer to pay or refund legal taxes. There is such an offer in the present bill, which makes the proof here both admissible and efficacious. It results from these views that the plea of former adjudication must be overruled. It remains only to consider the exceptions to the master's report, filed by the plaintiff's counsel. It appears that the only evidence presented to the master to establish the fact that respondent had paid legal taxes, were certain tax receipts. It is objected that these do not show that the taxes were legal, and it is insisted that their legality must be established by other and better evidence, showing a substantial compliance with the law. The burden is upon respondent, in order to establish his lien, to show that he has paid taxes for which the land in question was liable, and which the complainant would have been obliged to pay if respondent had not paid them.

It is therefore ordered that the case be referred to Webster, as master, to take further proof and report, on or before the first day of next term, what, if any, legal taxes against the land in controversy have been paid by respondents.

## UNITED STATES v. MARTIN.

*District Court, D. Oregon. February 3, 1883.*)

## 1. INDIAN COUNTRY—UMATILLA AGENCY.

Since the repeal of section 1 of the Indian intercourse act of 1834 (4 St. 129) by section 5596 of the Revised Statutes, the only Indian country in the United States, within the purview of that phrase, as used in chapter 4, title 28, of the Revised Statutes, is the tracts of country set apart by the authority of the United States for the exclusive use and occupancy of particular Indian tribes, and known as Indian reservations; and the Umatilla reservation in Oregon is such Indian country.

## 2. CRIMES COMMITTED BY OR AGAINST AN INDIAN.

In the exercise of its constitutional power to regulate intercourse with the Indian tribes, congress may define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa*, within as well as without the limits of a state.

## 3. MURDER ON THE UMATILLA RESERVATION.

Congress having provided for the punishment of murder committed in the Indian country, (sections 2145, 5339, Rev. St.,) the United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man; and therefore it is a violation of section 5398 of the Revised Statutes for any one to resist or obstruct the execution of an order made by a circuit court commissioner, engaged in the examination of an Indian charged before him with the commission of murder, under such circumstances.

## Information for Obstructing the Service of Process.

*James F. Watson*, for the United States.

*H. Y. Thompson*, for defendant.

DEADY, D. J. On January 9, 1883, an information was filed in this court by the district attorney, charging the defendant with a violation of section 5398 of the Revised Statutes, which enacts:

"Every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant, shall be imprisoned not more than 12 months, and fined not more than \$300."

The information contains two counts.

The first one alleges that on December 18, 1882, in this district, two Indians, namely, Peteus and Capsawalla, being then and there under the charge of an Indian agent, were duly arrested by the marshal of this district upon a warrant duly issued by a commissioner of the circuit court for this district, upon a charge of murder committed

by said Indians, in killing one —— Mulhenen, a white man, upon the Umatilla Indian reservation in this district, and were by the order of said commissioner duly committed to the jail of Umatilla county, for examination before him on said charge, the defendant being then and there the keeper of said jail; and that afterwards, on December 19th, said commissioner duly made and delivered to the deputy of said marshal an order commanding him to bring said Indians before him for examination upon the charge aforesaid, who then and there attempted to execute the same, but was prevented from so doing by the defendant, who knowingly and willfully refused to deliver said Indians to said deputy, and by force and violence prevented the latter from executing said order.

The second count alleges that the defendant obstructed an officer in the execution of process in the case of two other Indians, namely, Ah Hoot and Weet Snoot, charged before said commissioner on December 7, 1882, with the killing of said —— Mulhenen on said reservation, on which day they were duly committed by the order of said commissioner to the custody of P. McDowell, the keeper of the town jail at Pendleton, in said county, for examination on said charge; and that on December 18th the defendant took said Indians from the custody of said jailer of Pendleton, they being then and there in the custody of the latter under the order of the said commissioner.

Upon the filing of the information a warrant issued, upon which the defendant was arrested and held to bail in the sum of \$1,000.

The defendant demurs to the information, and for cause alleges substantially that "the courts of the United States do not have jurisdiction to try the Indians named in the information for the crime with which they are charged," and therefore the order or process which the officer was attempting to execute was void and not within the purview of the statute.

The question made by this demurrer was considered and decided by this court in *U. S. v. Bridleman*, 7 Sawy. 243, [S. C. 7 FED. REP. 894]—an information charging a white man with stealing from an Indian on this same reservation.

In that case it was held that this court has jurisdiction of a crime committed on the Umatilla reservation by a white man upon the person or property of an Indian, and *vice versa*, provided the crime is defined by a law of the United States directly applicable to the Indian country, or made so by sections 2145, 2146, of the Revised Statutes, which enact:

"Section 2145. Except as to crimes, the punishment of which is expressly provided in this title, [28,] the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"Section 2146. The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country, who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

The punishment of the crime of murder, committed in a place within the sole and exclusive jurisdiction of the United States, is provided for in section 5339 of the Revised Statutes, which enacts:

"Every person who commits murder within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, \* \* \* shall suffer death."

This section is made applicable to the Indian country by section 2145 of the Revised Statutes, *supra*; and if the Umatilla reservation is "Indian country," within the purview of the statute, the United States circuit court for this district has jurisdiction to try these Indians upon this charge of murder.

That the reservation is Indian country was held in *U. S. v. Bridleman*, *supra*. In that case the origin of this reservation, and the power of congress to regulate intercourse with the Indian tribes, was stated as follows:

"On June 9, 1855, a treaty was made with the Walla Walla, Cayuse, Umatilla, and other tribes and bands of Indians in Oregon and Washington territory, by which the reservation in question was set apart for the exclusive use of the Indians, in consideration of their ceding their right to a large extent of country. The treaty (12 St. 945) provides that the reservation 'shall be set apart as a residence for said Indians, which tract, for the purposes contemplated, shall be held and regarded as an Indian reservation; \* \* \* all of which tract shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and superintendent.'

"On February 14, 1859, (11 St. 383,) the state of Oregon, with exterior boundaries, including the Umatilla reservation, was 'received into the Union on an equal footing with the other states in all respects whatever,' without any proviso or provision concerning the Indians or Indian reservations therein.

"On March 8, 1859, the treaty was ratified by the senate, and on April 11th it was proclaimed by the president.

"The power to regulate commerce with the Indian tribes (U. S. Const. art. 1, § 8) includes not only traffic in commodities, but intercourse with such

tribes—the personal conduct of the white and other races to and with such tribes, and the numbers thereof, and *vice versa*. *Gibbons v. Ogden*, 9 Wheat. 189; *U. S. v. Holliday*, 3 Wall. 416.

“If the power to regulate the intercourse between the Indian and the white man includes the power to punish the latter for giving the former a drink of spirituous liquor within the limits of a state, as it undoubtedly does, (*U. S. v. Holliday, supra*.) then it must follow that the power to regulate such intercourse extends to and includes the power to punish any other act of a white man having or taking effect upon the person or property of an Indian within such limits, and *vice versa*, even to the taking of life.

“It is admitted that the power of congress to provide for the punishment of an act as a crime is limited to the subjects and places peculiar to the national government. Its power to do so arises from the locality of the act in question, when it is committed in a place within the exclusive jurisdiction of the United States, as its territories, forts, arsenals, etc.; and from the subject, when the punishment is imposed as a means of carrying into execution or enforcing any of the powers expressly granted to congress by the constitution; as the power to levy and collect taxes, to borrow money, to regulate commerce, etc.

“This intercourse is a subject of federal jurisdiction, the same as the naturalization of aliens, the subject of bankruptcies, or the establishment of post-offices, and therefore congress may pass laws regulating or even forbidding it, and providing for the punishment of acts or conduct growing out of it or connected therewith, resulting in injury either to the Indian or the other party, or calculated to interrupt or destroy its peaceful or beneficial character.

“Upon the national government is devolved the power and duty to supervise and control the intercourse between the Indians and its citizens, so that, as far as possible, each may be protected from wrong and injury by the other; and in the exercise of this power, and the performance of this duty, it is not limited or restrained by the fact that the Indians are within the limits of a state. The Indians were here before the state was, and the state was formed and admitted into the Union subject to their right to remain here, and the power of congress over the intercourse between them and the people of the state until they were removed or become a part of the latter through the agency or with the consent of the United States.”

By this treaty, which was ratified after the admission of the state into the Union, and took effect by relation from the date of its signing, (*U. S. v. Reynes*, 9 How. 143; *Davis v. The Police Court*, Id. 285; *Haver v. Yaker*, 9 Wall. 34,) this Umatilla reservation was set apart for the “exclusive use” of the Indians named, and no white person was allowed “to reside upon the same” without the permission of the United States. And this treaty, like every other made by the authority of the United States, is the supreme law of the land. *U. S. Const. art. 6, sub. 2*; *Worcester v. Georgia*, 6 Pet. 515.

In *U. S. v. 43 Gallons of Whisky*, 93 U. S. 188, Mr. Justice DAVIS, speaking for the supreme court, says: The power to regulate com-



merce with the Indian tribes is "as broad and free from restrictions as that to regulate commerce with foreign nations;" that "it is not confined to any locality," but "its existence necessarily implied the right to exercise it, whenever there was a subject to act upon, although within the limits of a state." Thus a treaty with a foreign nation may provide that the subjects of such nation may take real property situated in the United States by devise or descent, and although this may contravene the law of the state where the property is situated, such law must yield to the treaty, which the constitution makes supreme, *Id.* 197.

It may be conceded that the admission of Oregon into the Union upon an equality with the other states, without any special reservation of jurisdiction over the place then known and occupied as the Umatilla Indian reservation, extended the jurisdiction of the state thereover as to all subjects constitutionally within its power of legislation—such as a crime committed thereon by one white man upon another, and it may be by one Indian upon another. But the subject of the intercourse between the Indians and other people in Oregon still remained a matter within the jurisdiction of the United States, just as much as when the country was a territory.

In the case of the *U. S. v. Leathers*, 6 Sawy. 17, and the *U. S. v. Sturgeon*, *Id.* 29, it was held in the district court of Nevada that an Indian reservation established in Nevada on March 3, 1874,—after the admission of the state into the Union,—by a mere executive order, for "the use" of certain Indians, and afterwards incidentally recognized as such by congress, was "Indian country" within the meaning of sections 2133, 2139, and 2148 of the Revised Statutes, providing for the punishment of persons who reside or trade in the Indian country without license, or return thither after being removed therefrom, or introduce spirituous liquors into such country or dispose of the same to an Indian therein. On error from the circuit to the district court both these cases were affirmed by Judge SAWYER.

In this case, the government of the United States, in the exercise of its constitutional power to regulate trade and intercourse with the Walla Walla, Cayuse, Umatilla, and other tribes and bands of Indians in Oregon and Washington territory, through the action of the proper officers established this reservation while yet the state was a territory, and negotiated a treaty with these Indians, by the terms of which they were to reside thereon separate and apart from the whites, under the care and direction of the general government. The state was admitted into the Union without any provision on the sub-

ject *pro* or *con*; but immediately thereafter the treaty was ratified by the senate, and became the supreme law of the land. Nothing has since been done to modify it, or to limit its operation. The reservation has been exclusively occupied by the Indians, under the treaty, ever since they first went upon it, and congress has continually recognized it by annual appropriations, in pursuance of the treaty stipulations, for its support and the maintenance of an agent for the Indians thereon. The case is on all fours with the Nevada cases, except that this reservation was established by treaty instead of an executive order, and that the crime alleged to have been committed by these Indians is murder. But the difference in the mode of establishing the two reservations is not material, and if it were, this reservation has more claim to be considered "Indian territory" on that ground than the Nevada one. And the punishment of murder committed in the Indian country by the killing of a white man by an Indian, and *vice versa*, is as plainly provided for in section 2145 of the Revised Statutes as either of the crimes charged in *U. S. v. Leathers* and *U. S. v. Sturgeon*, *supra*. Indeed, the only point in the case that is at all open to argument is the question whether the Umatilla reservation is Indian country or not.

It is admitted that there is no express definition in the Revised Statutes, as there ought to be, of what constitutes Indian country. Section 1 of the intercourse act of June 30, 1834, (4 St. 729,) defining the boundaries of the then Indian country, has been repealed by section 5596 of the Revised Statutes.

In the progress of legislation for and the occupation of the country included therein, it had before that time become practically obsolete. And now, unless the tracts of country included in the reservations established by the general government for the exclusive use and occupation of the several Indian tribes are "Indian country," there is none in the United States, and all the provisions in the Revised Statutes relating to it, and providing for the punishment of crimes committed therein, are nugatory and without effect for a want of a subject to operate on.

But so long as there is any reasonable ground to hold otherwise, this court cannot assume that congress was fatuous enough to enact chapter 4 of title 28 of the Revised Statutes, concerning the "government of the Indian country," when there was no Indian country to govern.

Ever since the phrase "the Indian country" found its way into the federal legislation, it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occu-

pied by them, and set apart or designated as exclusively for their use, under and by the authority of the United States.

In the progress of time what are known as "the Indian reservations" have come to be the only country so occupied by them, and these now constitute the Indian country of the United States, and there is no other; and they are such in both law and fact. In *43 Gallons of Brandy*, 11 FED. REP. 47, Mr. Justice McCrARY held that section 1 of the intercourse act of 1834, *supra*, was repealed by section 5596 of the Revised Statutes, and that in his judgment the phrase "Indian country," as used in the Revised Statutes, now only includes "that portion of the public domain which is set apart as a reservation, or as reservations, for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished." Upon a rehearing of this case (14 FED. REP. 539) the learned judge said: "An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe of Indians. It may be set apart by an act of congress, by treaty, or by executive order." See, also, upon this point, *U. S. v. Bridleman*, *U. S. v. Leathers*, and *U. S. v. Sturgeon*, *supra*.

All the authorities cited by counsel for defendant, namely, *U. S. v. Ward*, 1 Woolw. 17; *U. S. v. The Yellow Sun*, 1 Dill. 271; and *U. S. v. McBratney*, 104 U. S. 621, except the latter, were cited and examined in *U. S. v. Bridleman*, *supra*, and shown not to be in conflict with this conclusion.

In *McBratney's Case*, the defendant, a white man, was convicted, in the circuit court of the United States for the district of Colorado, of the murder of a white man upon the Ute Indian reservation, the same being within the state of Colorado. Upon a motion in arrest of judgment the opinions of the circuit justice and district judge were opposed upon the question of whether the circuit court had jurisdiction of the crime of murder committed under those circumstances; and the same was certified to the supreme court, who answered it by Mr. Justice GRAY in the negative.

But that case does not touch the question under consideration here. It is not claimed in this case that the United States has any other jurisdiction over this reservation than that which is incident to its power to regulate the intercourse between the whites and Indians thereon. Of course, this does not include the case of a crime committed there by one white man upon another, for that is a matter which does not concern or affect such intercourse; and therefore Mr. Justice GRAY, in the conclusion of his opinion, is careful to say that

the decision in that case does not affect any question 'as to the punishment of crimes committed *by or against Indians*.

The case of the *State v. Dextater*, 47 Wis. 278, [S. C. 2 N. W. Rep. 436,] was also cited by counsel for defendant. In that it was decided that the state had jurisdiction of the crime of adultery committed on the Oneida reservation in Wisconsin by an Indian man with a white woman; but that does not touch the question of whether the United States has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man.

The demurrer is overruled, and the defendant is ordered to appear for arraignment.

See *Forty-Three Cases of Brandy*, 14 FED. REP. 539, and note, 540; *Forty-Three Gallons of Brandy*, 11 FED. REP. 47, and note, 51.

### UNITED STATES v. STORES and another.

(Circuit Court, S. D. Florida. November Term, 1882.)

1. PENALTY—CUTTING TIMBER ON PUBLIC LANDS—"TIMBER" DEFINED.

The term "timber," as used in section 2461, Rev. St., does not apply alone to large trees fitted for house or ship building, but includes trees of any size, of a character or sort that may be used in any kind of manufacture or the *construction* of any article.

2. SAME—PROSECUTION FOR—USE OF TREES NO JUSTIFICATION.

Using trees for fire-wood or burning into charcoal is no justification of the cutting.

3. SAME—HOMESTEAD ENTRY—NO EFFECT ON TITLE.

A homestead entry works no change in the title of lands which can prevent a prosecution under the said section.

Indictment for Cutting Timber on Lands of the United States.

*G. Bowne Patterson*, U. S. Dist. Atty., for the United States.

*J. B. Browne*, for defendants.

LOCKE, D. J., (*charging jury*.) These parties have been indicted for cutting timber on lands of the United States, contrary to the act of March 2, 1831, re-enacted in section 2461, Rev. St.; and there appear but two questions which require for you any instructions from the court, namely, the meaning of the term "timber" as used in the statute; and the character of the land upon which such cutting, if any, was done, in respect to its title or ownership. The term "timber," as used in commerce, refers generally only to large sticks of wood, squared or

capable of being squared for building houses or vessels; and certain trees only having been formerly used for such purposes, namely, the oak, the ash, and the elm, they alone were recognized as timber trees; but the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose, has wrought a change in the general acceptation of terms in connection therewith, and we find that Webster defines "timber" to be "that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like." This would include all sorts of wood from which any useful articles may be made, or which may be used to advantage in any class of manufacture or construction.

With so many peculiar significations, the intended meaning of the word usually depends upon the connection in which it is used or the character of the party making use of it,—as, for instance, a ship-carpenter would understand something quite different when he made use of it from what a cabinet-maker, a last-maker or a carriage-builder would,—and the question is, therefore, not what is the popular meaning as understood by any one class, but its meaning as used in the statute, and how the legislators have employed it; and this must be its most general and least-restricted sense, including in such signification what each and all classes would under such circumstances understand "timber" to be.

The language of the section under which this indictment was found mentions particularly live-oak and red-cedar trees, and then speaks of other timber, showing conclusively that it was not the intention of congress to confine the protection intended to any particular class or kind of trees, but to apply it in its most general sense.

To ascertain the meaning and intent of legislation no more direct or satisfactory way can be suggested than by referring to the manner in which the same terms are used in other enactments.

This word has been frequently used by congress on different occasions and for different purposes. Section 2317 of the Revised Statutes, and the acts of 1874 and 1875, provide that persons planting and protecting timber on the public lands shall be entitled to patents therefor. Section 2464 provides for planting timber and keeping it in a growing condition. The same term is used also in sections 2465 and 2466, and in each of these places in a manner that precludes absolutely the idea that the term "timber" was intended to be confined to such trees or wood of such sizes as must be especially adapted to house or ship building. The term is here used for live, growing

trees of a useful class, and cannot possibly be held to apply to those of a large size only.

The object of this prohibitory legislation is undoubtedly to prevent stripping the public lands of their growth of forests regardless of the present size and character of the individual trees, and the term used is intended to apply generally for that purpose; and if it is found that live trees of such a character or sort as might be of use or value in any kind of manufacture, or the construction of any useful articles, were cut, the charges in that respect, namely, the character of the timber, has been sufficiently proven. It matters not to what purposes the timber may have been applied after being cut, if converted to the use of the party accused. Selling it for fire-wood or burning it into charcoal would be no defense or excuse for cutting and removing; nor can it be evidence of the worthlessness of the timber cut sufficient to justify it. It must be found that the lands upon which the timber, if any, was cut were lands of the United States, sufficiently described and identified to satisfy you upon that point. It need not have been reserved or purchased for the sake of timber. A homestead entry, although it gives the party entering certain rights of occupation, does not so convey title or divest the United States of property in it as to change its character in this respect; and it is immaterial, therefore, whether the land had been entered for homestead by a third party or not. It is not claimed, nor does it appear, that the defendants herein had any interest, by homestead or otherwise.

Jury found verdict of guilty.

*Vide U. S. v. Briggs*, 9 How. 351; *U. S. v. Redy*, 5 McLean, 358; *U. S. v. Shuler*, 6 McLean, 28; *U. S. v. Cook*, 19 Wall. 592; *Forsythe v. U. S.* 9 How. 577; *Paine v. Northern Pac. R. Co.* 14 FED. REP. 407; *The Timber Cases*, 11 FED. REP. 81; *U. S. v. Smith*, 11 FED. REP. 487; *U. S. v. Mills*, 9 FED. REP. 684.

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### BIERBACH v. GOODYEAR RUBBER COMPANY.

(Circuit Court, E. D. Wisconsin. October Term, 1882.)

#### 1. NEGLIGENCE—PERSONAL INJURIES—COLLISION ON HIGHWAY.

Where teams have a right in the ordinary course of business to follow each other, turn about, pass and repass, that degree of care and caution must be exercised by parties using such highway, when in proximity to each other, to avoid doing each other injury, which would reasonably be expected of an ordinarily-prudent person in the surrounding circumstances.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Negligence is not to be imputed to a driver of a team from the mere fact of a collision; it is a fact to be proved as any other fact in the case; and, even where defendant was guilty of negligence, yet if there was a want of ordinary care on the part of the plaintiff, which as a proximate cause concurred with defendant's negligence in causing the accident, plaintiff cannot recover in an action for damages for personal injuries caused by a collision between vehicles on a highway.

3. SAME—CHOICE OF MEANS TO AVOID COLLISION.

Where a person exercising ordinary prudence and skill as driver of a vehicle up to the moment when danger of collision was imminent, and in the presence of such danger is compelled to choose what course of action he should take to avoid the danger, and did so in good faith, the mere fact that the result afterwards may show that his choice of a way to avoid the collision was not the best course, cannot be imputed to him as negligence.

4. SAME—MEASURE OF DAMAGES.

In an action for damages for personal injuries caused by a collision on a highway, where negligence only is imputed to the defendant's driver, and it is not claimed that the collision was caused by any intentional, malicious, or willful act, exemplary damages cannot be allowed. The damages which plaintiff may recover are such as will compensate him for the loss and injury sustained.

5. SAME—PROSPECTIVE DAMAGES.

Where plaintiff is entitled to damages for injuries sustained from the collision, he may recover prospective compensatory damages, or such as it is proved will directly result in the future from the injury complained of, in addition to past and present damages.

*R. N. Austin and Geo. B. Goodwin, for plaintiff.*

*E. P. Smith and Jas. G. Jenkins, for defendant.*

DYER, D. J., (*charging jury*.) The plaintiff in this action claims that in July, 1880, while he was riding in a wagon which was being drawn by a horse driven by his servant on one of the streets of this city, an employe of the defendant so carelessly and negligently drove a horse which was drawing a wagon belonging to the defendant that the two vehicles came in collision; that the plaintiff's wagon was overturned, and that he was thrown violently to the ground and seriously injured; and this action is brought to recover damages for the injuries claimed to have been thus received.

The undisputed testimony shows that the plaintiff, in company with his servant, left his place of business on Second street and drove to Grand avenue; that they turned east on Grand avenue and proceeded on their way until they reached a point about midway in the block, and near the Plankinton House, where they attempted to turn about and return to the plaintiff's place of business. It appears that the defendant's horse and wagon were in their rear, and were also going east on the same street, and that as the plaintiff's horse and wagon were turning about, the collision occurred. These are general

facts not questioned, but concerning the precise positions of the two vehicles just before and at the time of the collision, and as to the manner in which the horses of the respective parties were driven and managed, and as to other circumstances bearing upon the occurrence, there is conflict in the testimony.

The ground upon which the contention of the plaintiff necessarily proceeds is that the collision was occasioned by the negligence of the defendant's driver. As he was the defendant's agent, of course any negligence on his part was the defendant's negligence. So, too, the plaintiff was chargeable with any negligence on the part of his driver in the management of his horse and vehicle. The collision occurred on a public thoroughfare, where teams have a right, in the course of business, to follow each other, turn about, pass and repass. Upon both of the parties there was devolved the duty of exercising reasonable care to avoid doing each other injury. It was the duty of the defendant's servant to observe with ordinary care and diligence the movements of the vehicle in advance of him, as it was the duty of the plaintiff, in turning his horse and wagon about at that place, to observe with the same kind of care and watchfulness the presence and movements of any vehicle in proximity to his. Ordinary care and caution, as mentioned in these instructions, mean that degree of care and caution which would reasonably be expected of an ordinarily prudent person in the circumstances surrounding the parties at the time of the alleged injury.

It is claimed by the plaintiff that the defendant's servant was guilty of negligence, and that this was the cause of the collision and injury. The burden of proof, therefore, is upon the plaintiff to prove the alleged negligence. Negligence is not to be imputed to the defendant's driver from the mere fact of the collision. The negligence or want of care must be proven, as any other fact in the case, and is not to be presumed.

The first question, then, is, was there negligence on the part of the defendant's servant? that is, was there, on his part, a want of such care and caution as an ordinarily prudent person would exercise in the circumstances which existed immediately preceding and at the time of the collision? And this question of alleged negligence or want of ordinary care must be determined by you in the light of the evidence. If you find that the collision was not occasioned by the fault or negligence of the defendant's driver, that, of course, will be the end of the case, for in that event the defendant will be entitled to your verdict. But if you find that the defendant's driver was negli-



gent, then you will have to go a step further, and inquire whether the plaintiff's driver was or was not guilty of negligence, which proximately contributed to the accident; that is, was there on his part a want of ordinary care, which thus contributed to the injury. For, even though the defendant was guilty of negligence upon the occasion in question, yet if there was a want of ordinary care, however slight, on the part of the plaintiff which, as a proximate cause concurred with the defendant's negligence in causing the accident, the plaintiff cannot recover. And by proximate cause, or negligence which proximately contributed to the accident, is meant negligence occurring at the time of the event—negligence having immediate or present relation to the accident.

Now, gentlemen, the facts of this case you must determine upon the evidence. As I have indicated, the first question for your consideration is, was the defendant guilty of negligence which occasioned the alleged injury?

It is claimed by the plaintiff that the defendant's driver, before a collision was imminent, was inattentive to the movements of the vehicle in advance of him; that he drove on at the speed at which he had been going and made no effort to turn his horse to the right, or towards the curb, until a collision was unavoidable; that there was ample space between the plaintiff's wagon and the right margin of the street to pass, and that no effort to pass was made, until it was too late to do so without bringing the two wagons in contact.

On the part of the defendant it is insisted that the defendant's horse and wagon were proceeding at a moderate rate of speed, from 10 to 15 feet behind the vehicle of the plaintiff; that the plaintiff gave no indications that he intended to turn about, until the speed of the plaintiff's horse was suddenly stopped and the effort to turn was made; that the defendant's driver at once reined his horse to the right so as to pass the plaintiff's wagon; that the collision was occasioned by the management and movements of the plaintiff's horse and wagon; and that the defendant's driver exercised throughout the ordinary care which any reasonably prudent man would have exercised in such circumstances.

It is especially insisted by the defendant's counsel that no negligence is imputable to the defendant on account of anything that occurred prior to the moment when the plaintiff's driver began to turn his horse and wagon about, and that when, in consequence of that act, an emergency arose requiring instant action, the defendant's servant took such measures in the management of his horse, and to avoid the

collision, as his best judgment prompted; and if he then erred in judgment such error is not to be imputed to him as negligence. Upon that point the court instructs you that if it be true that there was no want of ordinary care on the part of the defendant's driver in driving his horse and vehicle up to the moment when the danger of a collision was imminent, and if, in the presence of such danger, the defendant's servant, exercising at the time ordinary prudence and skill, was compelled immediately to choose what course of action he would then take to avoid the danger, and did so in good faith, the mere fact that the result afterwards may have shown that his choice of a way of avoiding the collision was not the best, cannot properly be imputed to him as negligence. In other words, a mere error of judgment in such circumstances would not be negligence. I do not understand this to be disputed on the part of the plaintiff, but it is claimed that the defendant's servant was guilty of negligence in driving his horse, before any emergency arose requiring instant exercise of judgment and action, and that the emergency was brought about or created by such negligence, and hence that the defendant cannot be absolved from liability on the ground of error of judgment on the part of its driver.

Of course, if there was want of ordinary care on the part of the defendant's servant before the danger of a collision was imminent, and at a time when, by the exercise of such care, the collision could have been avoided, and the want of such care created or helped to create the emergency which afterwards arose, then the defendant could not be relieved of responsibility for its servant's original fault by the exercise of his best judgment in endeavoring to escape from the emergency after it was upon him. And you will notice that the proposition previously stated, that an error of judgment would not be imputable as negligence, is based on the assumption that, before danger was imminent, the defendant's servant was guilty of no negligence.

Now, taking up this question of the alleged negligence of the defendant's driver, you will consider it in the light of all the facts elicited by the testimony. If the alleged negligence is not proved, then, as I have said, there can be no recovery. If, on the contrary, you find that the defendant's driver was negligent, you will then proceed to inquire whether there was any want of care on the part of the plaintiff's driver which contributed proximately to the injury.

Upon this branch of the case it is claimed by the defendant that the plaintiff's driver, without giving any previous warning, suddenly

stopped the speed of his horse and began to turn his vehicle about; that the plaintiff and his driver paid no attention to the horse and wagon behind him; that their horse was so negligently controlled as to cause the wagon to back; and it is claimed that if the wagon had not backed the defendant's horse and vehicle would have passed in safety and the collision would have been averted. In these particulars, and perhaps in others, it is insisted that the plaintiff's driver was chargeable with carelessness, and that the collision was occasioned by his want of care.

All this is denied on the part of the plaintiff, who claims that his horse was prudently managed; that he attempted to turn about in a proper manner; that his wagon did not back, but that its movement was steadily forward until struck by the defendant's wagon; and that the collision was caused, not by any contributory negligence of the plaintiff's driver, but by the alleged neglect of the defendant's driver to turn to the right in time to pass in safety.

These are, in brief, the claims of the parties upon this question. The circumstances of the collision have been laid before you. The evidence has been fully discussed, and it is left to you to determine what are the facts touching this question of the alleged contributory negligence of the plaintiff in connection with the collision.

If you find the plaintiff entitled to recover, you will then proceed to determine the amount of his recovery, within such limitations as the court will now state to you. The case is one in which the plaintiff can recover, if at all, only such damages as are purely compensatory. It is not claimed that the collision was caused by any intentional or malicious or willful act of the defendant's servant. Negligence only is imputed to him, and therefore exemplary damages—that is, damages by way of punishment—cannot be allowed.

The damages which the plaintiff may recover, if entitled to recover at all, are such as will compensate him for the loss and injury sustained. "The rule is that where one is injured by another under such circumstances that the injuring party is liable for damages, he should pay such an amount as will compensate for pain and suffering, expense of physicians and medicines, loss of time and business, when engaged in business, also injury to him physically and mentally affecting his capacity to labor or to carry on his business; and, in considering these, the jury have the right to include not only past losses, but to allow for continuing losses, where the evidence satisfies them that the injuries will continue" or are permanent. 11 FED. REP. 568. In other words, if the plaintiff is entitled to recover, and if he sus-

tained injuries, resulting solely from the collision, which the evidence clearly satisfies you are permanent, then he may recover prospective compensatory damages, that is, such damages as it is proved will directly result in the future from the injury complained of, in addition to past and present damages.

Upon the question of the extent and character of the injury alleged to have been sustained by the plaintiff in the wagon accident, much testimony has been given on both sides. It is in proof that in January, 1876, he was accidentally wounded by a pistol shot, and it is claimed by the defendant that the injury the plaintiff then sustained is the real cause of the physical weaknesses, suffering, and disabilities of which he now complains; and that his past and present condition is attributable to that injury and not to the wagon accident. On the other hand, it is insisted that the plaintiff wholly recovered from the pistol-shot wound before the alleged wagon injury, and that the disabilities from which, it is claimed, he has suffered since July, 1880, were caused by and are traceable to the fall from the wagon. In considering this question in connection with the subject of damages, if you find the plaintiff entitled to recover, you will carefully weigh and consider all the testimony bearing upon it. If your conclusion shall be that the plaintiff should recover, you will bear in mind that the extent of his recovery, in form of damages, should be limited strictly to compensation for injuries and losses occasioned by the wagon accident alone. If any of the injuries detailed by the plaintiff existed at the date of and prior to the accident, he cannot in this action recover for such prior injuries; but if those injuries and their effects are shown by the evidence to have been aggravated by his fall from the wagon, damages for the aggravation thereof may be allowed. Your good sense must naturally lead you to the conclusion that the defendant cannot be called on to compensate the plaintiff for injuries and disabilities produced by causes for which the defendant is not responsible. It can only be made accountable for such injuries, if any, as the evidence shows were caused by the alleged negligent acts of the defendant; which, of course, would include the aggravation of any former injuries.

Counsel for the plaintiff have asked the court to give you certain instructions upon this question of damages, which are probably covered by what the court has already said to you. But lest they are not, I will add that such compensatory damages, within the limits before stated, as were the direct and proximate result of the alleged wagon injury, may be allowed, if the plaintiff is entitled to recover.

And if you should find, as facts in the case, that at the time of the wagon accident the plaintiff had not fully recovered from a previous injury, and that his complete recovery therefrom was retarded or prevented by his fall from the wagon, or that as the result of a previous injury he had chronic or latent inflammation, which, in the course of nature, would have developed slowly, and that as the direct result of the wagon accident the disease was developed sooner and in a more acute form than it would otherwise have done, such facts may be taken into consideration by you as elements of damage, if you find the plaintiff entitled to recover.

So, gentlemen, if your conclusion shall be that the plaintiff is entitled to a verdict, you will take up this question of damages, and, in the light of all the evidence, determine what amount, within the rules and limitations I have stated, the plaintiff is fairly and reasonably entitled to recover as compensation for any injuries occasioned by the alleged negligence of the defendant at the time of the occurrence in question. \* \* \*

Verdict for plaintiff for \$4,500.

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BUCKLEY v. GOULD & CURRY SILVER MINING CO.

*Circuit Court, D. Nevada. November 9, 1882.)*

1. NEGLIGENCE OF FELLOW-SERVANT.

The employer is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same line or department of employment, provided the employer exercises due care in the selection of competent servants.

2. WHO ARE FELLOW-SERVANTS.

The runner of a steam-engine employed in lowering men and material, and hoisting rock in sinking a shaft, is a fellow-servant in the same line or department of service, within the rule, with the men in the shaft engaged in excavating the shaft and loading the rock to be hoisted.

3. NO WARRANTY—ONLY DUE CARE REQUIRED.

The employer does not warrant the competency of his servants. He is only bound to exercise due care in the selection of careful and competent men for the service to be performed.

4. EVIDENCE OF INCOMPETENCY.

The mere fact that an accident occurred, though evidence of negligence on that particular occasion, is not, by itself, sufficient evidence to authorize a jury to find that the party so negligent is not a careful and competent man for the service in which he was engaged.

## 5. INSTRUCTION TO JURY IN ABSENCE OF EVIDENCE.

Upon the close of plaintiff's testimony, if the evidence is insufficient to justify a verdict for plaintiff, the court will instruct the jury to find for the defendant.

This case was tried by a jury. At the close of plaintiff's testimony the defendant's counsel asked the court to instruct the jury to find a verdict for the defendant, on the ground that there was not sufficient testimony to go to the jury or to justify a verdict in favor of the plaintiff.

*W. E. F. Deal*, for plaintiff.

*B. C. Whitman* and *M. N. Stone*, for defendant.

*SAWYER, C. J.*, (orally.) We have carefully considered the motion to instruct the jury to find a verdict for defendant in this case. The main question is whether the engineer—runner, as he is termed, of this engine—is a fellow-servant with the plaintiff in this case within the meaning of the rule, which asserts the principle that the master is not liable for an injury resulting to one servant from the negligence of a fellow-servant in the same line of employment. We are fully satisfied that he is a fellow-servant within the principle and meaning of the rule. We have no doubt on that point. We do not think *Hough v. Railway Co.* 100 U. S. 213, cited by the plaintiff, militates against that proposition. On the contrary, we think it is an authority directly in favor of defendant in this case. The court in that case recognizes the rule; it does not question it; it only notices the distinction which takes that case out of the rule. Mr. Justice HARLAN, in delivering the opinion, says that the English authorities go much further in favor of the doctrine of the immunity of the master from the responsibility for injuries received by a servant in consequence of the negligence of his fellow-servant in the same line of employment, than the American courts. But the decision in *Hough v. Railway Co.* is put upon another ground, namely: that the act complained of in that case was the act of the company itself. A corporation must always act through its agents. The rule is recognized that the company is bound to use all reasonable care and diligence in furnishing suitable and safe machinery for its servants to work with. In that case there was a violation of that rule. The defendant did not furnish a good and sufficient cow-catcher and steam-whistle. The accident occurred in consequence of the improper condition of the locomotive engine. The engine ran off the track by reason of a defective cow-catcher, and the steam-whistle was blown or knocked off in consequence of not being properly fast-

ened, and the engineer was scalded to death by the escaping hot steam. It was the duty of the company to use all reasonable diligence to furnish a safe engine. To furnish a safe engine is one thing, but its management by the engineer is quite another. The engineer was simply an employe, working with the machinery. That machinery had to be furnished by those charged with that duty. Those men in charge, furnishing and supervising the engine, were the agents of the corporation for that purpose. This service could only be performed by a corporation through agents. Therefore their acts were the acts of the corporation, and not merely of fellow-servants. They were the acts of the corporation, through its agents, in furnishing machinery to work with. The decision is put upon that ground alone, and the court recognizes it as not being within the rule. It would have been the same in this case if the engine that was used in this mine had been a rickety, defective old engine, out of order, and the accident had resulted from the use of that engine in consequence of its defects. Then this case would have been precisely like the one cited.

But the foundation of this action is that the accident was the result of the carelessness of the man who was running the engine. He was not an agent of the company. He had no authority over the plaintiff. He was merely a workman running an engine under the direction of a chief engineer, a general foreman, and a superintendent of the mine. It was not his business to furnish the engine. He had no authority whatever. He was co-operating with plaintiff in sinking the shaft. He was simply a fellow-servant co-operating in sinking the shaft. We do not think it makes any difference whether he was running an engine, or working with a wheel and axle, a pulley and bucket, or carrying the material up and down a ladder upon his shoulders. He was doing the same work, but doing it by different means. Every man below performed his part of the work in sinking the shaft—the work in which they were all engaged. They were working together in the same department in excavating this shaft. The fact that the engine-runner, as he is called, was using a different instrument in carrying the material up and supplies down makes no difference. It was work done in a common employment to accomplish a common end—the sinking of a shaft. One servant performed one part, and another another part.

In the old Spanish mines, in early days, and even yet in some parts of Mexico and South America, the ore is carried in sacks upon the backs of men by climbing up and down ladders, instead of using

an engine. In sinking this shaft, if instead of the steam-engine used in carrying down the fuse and powder for a blast—the work actually engaged in at the time of the accident—or in raising the rock, the party running the engine had gone up and down a ladder, carrying the material used in mining down, and the rock up, we apprehend that no one would have asserted that he was not a co-servant in sinking the shaft—that he was not performing a common service in the same line or department of employment with those below. The fact of using another appliance does not change the character of the act; it was the same work. The authorities go to that extent. Take the case of *Wood v. New Bedford Coal Co.* 121 Mass. 252. The plaintiff was a laborer employed in hoisting coal by machinery, operated by a steam-engine. When it was hoisted to a certain height the man running the engine was to stop it. There was a man near the point where the coal was discharged to manage and empty the coal by means of a crank. The engineer hoisted the bucket too high, so that it went past the point where he should have stopped, and thereby the man at the crank was struck by it and severely injured. In that case the engine-runner and the man at the crank aiding to discharge the coal were held to be fellow-servants in the same department of employment, and the company not liable. That is in all respects like this, at least so far as the principle is concerned.

Again, in *Kelly v. Norcross*, 121 Mass. 508, the carpenters were charged with building a staging. The employers furnished suitable materials and committed the duty of building the staging to the carpenters, who had charge of the work themselves. The carpenters were superintending the construction of the staging, and the accident resulted from their negligence. An accident happened by which the staging fell and injured some of the laborers. They were held to be fellow-laborers within the rule.

In another case—*Holden v. Fitchburg R. R.* 129 Mass. 268—the head-note reads:

“The rule of law that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher or greater authority than the plaintiff.



"A railroad corporation is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad."

In this case parties were employed in widening the road, and, for the purpose of performing that work, a derrick was erected. That is no part of the business of running a railroad. It is widening a road—enlarging its facilities. A train coming along, this derrick fell, and a brakeman passing this wreck was injured by a rope attached to the fallen derrick. He was engaged in running the train. The other men were engaged in widening the road for the company. They were held to be fellow-servants within the meaning of the rule. If they were so, these parties here must be fellow-workmen.

In *Cooper v. Mil. & Pra. du C. R. Co.* 23 Wis. 669, a flagman, who failed to properly notify the train of a break in the road, was held to be a fellow-servant with a brakeman on the train, killed in consequence of the negligence.

So, also, in a Wisconsin case, where a train went out to clear the track of snow. They had a party of snow-shovelers, designed to shovel snow off the road. The conductor concluded to clear the road at a certain point with a snow-plow. He made a rush into the snow with his snow-plow, and the result was that the train was thrown from the track. One of the snow-shoveling party, going to his work, was injured. The snow-shoveler injured was held to be a co-laborer in the same employment with the conductor, and the employer not liable on that ground. *Howland v. Mil., L. S. & W. R. Co.* 13 Reporter, 607; also see cases cited.

In Michigan, an engineer and conductor of freight trains are held to be fellow-servants. *Mich. C. R. Co. v. Dolan*, 32 Mich. 510.

In *Collier v. Steinhart*, 51 Cal. 117, it was held that the engineer running the engine to hoist water from a mine, by whose carelessness a tub of water fell upon a laborer at the bottom of the mine and injured him, was a fellow-servant with the party injured, within the rule.

So in *McLean v. Blue Point Gravel Min. Co.* Id. 257, McLean being in the hydraulic department, was injured by the carelessness of Regan, foreman in the blasting department of the "general business." McLean and Regan were held to be fellow-servants within the rule.

These are only a few of the many cases found in the books which illustrate this point. We do not find anything against it. The case

of *Kielley v. Belcher Silver Min. Co.* 3 Sawy. 500, on the trial, is a similar case. We do not think the decision on the demurrer in that case militates against the principle. *Id.* 437. The judge who delivered the opinion on the demurrer concurred in the opinion at the trial; they were not considered to be in conflict. We think the plaintiff and this runner of the engine were in the same line of employment, and substantially in the same department of service. There can be no recovery for any injury resulting from the negligence of his co-servant on that ground. There is nothing, then, to go to the jury on that point.

The next point is on the allegation in the complaint that the company employed an unskillful engineer. That allegation falls short of being sufficient. The company is not bound, under all circumstances, and at all events, to employ a skillful and competent engineer; it is only bound to exercise due diligence and care in that respect. It does not warrant that he shall be skillful, but it is bound to use due diligence in providing or employing a skillful and competent engineer. It may have fully performed that duty; if it did, it is not liable. There is no allegation that it did not exercise due diligence, or was negligent in this respect; but the fact only is alleged that the engineer was unskillful. Conceding it to be otherwise, there is no testimony here to show that this engine-runner was not a competent party; the only testimony is the fact that in this instance an accident happened. An accident may happen to the most competent and skillful man. He may have for years been without fault, and the fact that in this instance he was negligent is not inconsistent with the idea that he was generally a careful man, and entirely competent to perform the duties which he performed. And the mere fact of the single accident, although evidence of negligence in that particular instance, is not sufficient evidence, as held by many authorities, of incompetency, or that he is not a careful man. Quite a number of cases to that effect were cited on the argument, and none have been cited to the contrary.

In *Wood v. Bedford Coal Co.* 121 Mass. 252, it was alleged that defendant knowingly employed an incompetent engineer. The accident happened, yet the court says: "The declaration alleges as one ground of the defendant's liability that it knowingly employed an unskillful and incompetent person as engineer. The plaintiff does not contend that there was any evidence to support this allegation." Even counsel for plaintiff did not contend that the accident was evi-

dence of the incompetency of the engineer. "The difficulty of the plaintiff's case is that the evidence clearly shows that the injury to him was caused by the negligent act of a fellow-servant."

Just so in this case. There is no evidence here upon this point.

Again, in the case of *Kelley v. Norcross*, before cited; where the staging fell, the accident happened, but the court said:

"There was no evidence that the men were not in all respects competent workmen, or that the materials provided were unsuitable; and, without some such evidence, there was upon these points no question upon which the plaintiff was entitled to go to the jury. If there was neglect on the part of the carpenters, either in the construction of the staging or in leaving it, after it had been partially constructed, to be continued or completed by the masons, it was the neglect of the fellow-servants of the plaintiff's intestate, who were competent to have properly performed the work."

The mere fact of the negligence was held to be no evidence to go to the jury.

In *Cooper v. Mil. & Pra. du C. Ry. Co.* 33 Wis. 671, it was said:

"But all this is to no purpose, so long as it is not shown that the company, its officers or agents, were negligent in the employment of these persons, or in retaining them in its service. The negligence of the company, its officers or agents, in employing careless and unfit servants, is the gist of the action; and unless this be shown there can be no recovery. \* \* \* Aside from the proof of negligence in the servants on the occasion in question, which is, clearly, not enough to charge the company, there is not the slightest evidence showing, or tending to show, negligence on the part of the company in the employment of those servants."

This case is directly in point. These are only a few out of a great many cases deciding that question. There is not a particle of evidence, other than the fact of the accident, in this case that this engine-runner was not entirely competent, or that he was not a careful man. The testimony of the plaintiff shows that the engine-runner had been an engineer long before he went on this mine, and that plaintiff knew it.

The mere fact that he was negligent at this time is not sufficient evidence of his incompetency. There are numerous cases to the same point. There is no testimony sufficient to go to the jury to show his incompetency. And not only must it appear that he was not in fact incompetent, but also that the company did not use due care in employing him. If the allegation were sufficient, there is nothing to show on any of those points that the defendant is liable.

The only other point is as to whether there is anything to go to the jury upon the question of the bell. We are satisfied, on that

point, that there is nothing to justify the jury in finding that the accident resulted from the breaking down of that bell. On the contrary, the testimony shows that the accident resulted from the negligent act of the runner of the engine. No one testifies that plaintiff could have escaped if the bell had been there. The testimony of plaintiff's witness, Cumelford, is that he could not have got out—that there was not sufficient time had the bell rung. The cage came down so rapidly that he could not have got out of the way. There is no testimony that he could have got out of the way. The testimony is that the cage, ordinarily, came down to the place where the bell was and stopped, and only came down from that point at a given signal from below. But this time it did not stop. It was the ordinary practice to stop it within 50 feet of the bottom and there wait until the signal to lower it was given, and then to lower it slowly. But at this time it not only came down without stopping, but it came rapidly.

At the time of the accident it came down with great rapidity. The engineer did not even stop the engine when the cage reached the bottom, for there were some 40 feet of cable piled up on top of the cage. The testimony clearly shows, and there is nothing to the contrary, that the accident resulted purely and solely from the carelessness of the engineer in dropping the cage down at a rapid rate, without stopping or giving any notice. The accident, therefore, resulted from the negligence of a co-laborer in that employment. If the jury were to find, upon such testimony, that the accident resulted from the absence of this bell, we should be compelled to set aside the verdict. We feel bound, therefore, under repeated rulings of the supreme court, to grant the motion, and we shall so instruct the jury.

Instruction and verdict accordingly.

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MASTER'S DUTY IN SELECTION AND RETENTION OF SERVANTS. A master is under no absolute obligation to employ only fit and competent servants, but he is bound to exercise reasonable or ordinary care to that end.<sup>(a)</sup> As he is bound to exercise this care in supplying reasonably safe and suitable machinery for the use of his servants, and in maintaining the same in proper repair,<sup>(b)</sup> so he must exercise such care in hiring and retaining only competent employes. It is well settled that he does not necessarily discharge this

<sup>(a)</sup> *Lanier v. N. Y. Central, etc.*, R. Co. 49 N. Y. 521; *Gilman v. Eastern R. Co.* 13 Allen, 440; *Smoot v. Mobile & M. Ry. Co.* 67 Ala. 13; *Moss v.*

*Pacific R. Co.* 49 Mo. 167; *Gunter v. Graniteville Manuf'g Co.* 15 S. C. 443.

<sup>(b)</sup> As to his duty in this respect, see note to *O'Neil v. St. Louis, etc.*, R. Co. 9 Fed. Rep. 341.

duty merely by the appointment of a competent agent to perform it, and that for its negligent performance by such agent the master is responsible.(c) And his duty is not discharged by the exercise of due care in hiring competent servants merely, but the same care must still be exercised in continuing them in service, "and if he retains an incompetent servant, after knowledge of his incompetency, or when, in the exercise of due care, he ought to have known it, he is as responsible as if he had been wanting in the same care in hiring.(d) If the master has exercised due care in the selection and retention of his servants, he is not answerable for injuries to a servant through the negligence of a fellow-servant.

WHO ARE FELLOW-SERVANTS. Upon this question there is no little difference of opinion among the authorities. The English doctrine, and that held by the weight of authority in this country, is, that all the servants of the same master, engaged in carrying forward the common enterprise, although in different departments, widely separated or strictly subordinated to others, are to be regarded as fellow-servants, bound by the terms of their employment to run the hazard of any negligence of any of their number, so far as it operates to their detriment.(e) In other words, where the general object to be accomplished is one and the same, the employer the same, the several servants deriving authority and compensation from the same source, all employes and agents, from the highest to the lowest, are regarded as fellow-servants, no matter how remote from each other they may usually be occupied, or how distinct in character and nature may be their respective duties and employments, and without regard to any difference in rank or authority.(f)

FELLOW-SERVANTS, ALTHOUGH IN DIFFERENT DEPARTMENTS OF LABOR. "In order that workmen should be fellow-servants," said Lord CRANWORTH, in *Bartonshill Coal Co. v. Reid*,(g) "it is not necessary that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similiar acts. The driver and guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge and those who hammer it into shape, the engine-man who conducts a train and the man who regulates the switches or the signals, are all engaged in common work. And so, in this case, the man who lets the miners down into the mine, in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employers in bringing the coal to the surface." To constitute the relation of fellow-servants, "they need not at the time be engaged in the same particular work. It is

(c) *Flike v. Boston, etc.*, R. Co. 53 N. Y. 549, 553; *Gilman v. Eastern R. Co.* 13 Allen, 440; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Booth v. Boston, etc.*, R. Co. 73 N. Y. 38.

(d) *Shanny v. Androscoggin Mills*, 66 Me. 418; *Michigan, etc.*, R. Co. v. *Dolan*, 32 Mich. 510, 513. But see *Chapman v. Frie R. Co.* 55 N. Y. 579.

(e) 1 Reel. Railw. § 131.

(f) *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 326; *Bartonshill Coal Co. v. Reid*, 3 Macq. 295; *Allen v. Gas Co.* L. R. 1 Exch. Div. 251; *Rourke v. White Moss Colliery Co.* L. R. 1 Com. Pl. Div. 556; *Railroad v. Fort*, 17 Wall. 553; *Blake v. Maine Cent. R. Co.* 70 Me. 60; *Albro v. Agawam Canal Co.* 6 Cush. 75; *Gilshannon v. Stony Brook R. R.* 10 Cush. 228.

(g) 3 Macq. 295.

sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes." (h.)

Thus, in a recent case, in the English court of appeals, (i) where the defendants, brewers, contracted with one Ansell to unload a barge of coal for the use of the brewery, at so much per ton, he to hire his help and pay them out of the money received from defendants, but having no power to discharge any employe without the defendant's consent, it was held that a laborer, employed by Ansell in unloading the coal, was a fellow-servant with those at work in the brewery (j). The superintendent of the mill and a common spinner; (k) a master of a vessel and the mate; (l) the heads of different departments of work in the same coal mine, under a common superintendent; (m) a timberman, whose duty it was to attend to the erection and repair of bridges in a mine, and a miner; (n) an under-ground workman in a coal-pit and the engineer at the top of the pit; (o) and an "underlooker" in a coal mine, whose duty it was to see that the roof was securely propped up, and a common laborer in the mine, (p)—have been held to be fellow-servants. Applying this rule to railway service, "all who are engaged in accomplishing the ultimate end in view—that is, the running of the road—must be regarded as engaged in the same general business, within the rule;" e. g., a locomotive engineer and a master mechanic of the railroad; (q) a track repairer and those in charge of the train on which he rode; (r) those in charge of a locomotive and a section-man engaged in repairing the track; (s) the carpenter and those in charge of the train by which he is carried to or from his work, in pursuance of his contract of service; (t) the carpenter and the employes in charge of a turntable; (u) a brakeman and an engineer on the same train; (v) a brakeman on one train, and the conductor or engineer on another train belonging to the same company; (w) a track repairer and the fireman or engineer of a passing train; (x) and the conductor and others in charge of a train sent out to clear the snow from the track and a snow-shoveler carried on the train. (y)

Even under the English doctrine, the remoteness of the duties performed is not wholly immaterial to the determination of the question as to who are fellow-servants. Said Lord Justice COTTON, in *Charles v. Taylor*: (a) "Many cases may be put where the master might be liable, as where he carries on two distinct businesses, and a person employed in one of them is injured by the negligence of a person employed in the other." The principle upon which

(h) *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

(i) *Charles v. Taylor*, 38 Law T. (N. S.) 773.

(j) Compare *Rourke v. White Moss Colliery Co.* L. R. 1 Com. Pl. Div. 556.

(k) *Albro v. Agawam Canal Co.* 6 Cush. 75.

(l) *Halverson v. Misen*, 3 Sawy. 562.

(m) *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

(n) *Quincy Mining Co. v. Kitts*, 42 Mich. 34.

(o) *Bartonshill Coal Co. v. Reid*, 3 Macq. 266.

(p) *Hall v. Johnson*, 3 Harl. & C. 589.

(q) *Hard v. Vermont, etc.*, R. Co. 32 Vt. 473.

(r) *Gilshannon v. Stony Brook R. Co.* 10 Cush. 228.

(s) *Foster v. Minnesota, etc.*, R. Co. 14 Minn. 360.

(t) *Seaver v. Boston, etc.*, R. Co. 14 Gray, 466.

(u) *Morgan v. Vale of Neath R. Co.* L. R. 1 Q. B. 149.

(v) *Pittsburgh, etc., Ry. Co. v. Lewis*, 33 Ohio St. 196.

(w) *Pittsburgh, etc., R. Co. v. Devlinney*, 17 Ohio St. 197.

(x) *Waaalen v. Mad River, etc.*, R. Co. 8 Ohio St. 249.

(y) *Howland v. Milwaukee, etc.*, Ry. Co. 54 Wis. 22.

(a) 38 Law T. (N. S.) 773, 775.

such cases would rest may be gathered from the opinion of Justice BLACKBURN in *Morgan v. Vale of Neath R. Co.*,<sup>(b)</sup> where he says: "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks, which are to be considered in his wages."

The converse of this proposition legitimately follows, and is sustained by some of the American courts. The principle was thus stated by HILLYER, J., in *Kielley v. Belcher Silver Min. Co.*,<sup>(c)</sup> referred to in the principal case: "That the servant, having voluntarily entered into a contract of service to do a specified work for a specified compensation, has thereby accepted the ordinary perils incident to doing that work; and whenever the negligence of another employe of the same master can be considered an ordinary risk, one which he might reasonably anticipate at the time of making his contract, he accepts also the perils liable to happen through such negligence. And it seems clear that upon this principle those only are fellow-servants for whose negligence, one to another, the master is exempt, who serve in such capacity, and in such relation to the master and each other, that the means of the servants to protect themselves are equal to or greater than those of the master to afford them protection, and that, further than this, justice and policy forbid us to carry the implied portion of the contract of service. Beyond this, an injured servant has as clear title to relief against the master as a stranger, upon the maxim of *respondeat superior*." If the true reason for the master's exemption is, that the servant has taken the risk of the negligence of his fellows into account when fixing his wages, then he should be held to have assumed only the risks which he could reasonably anticipate when accepting the service.<sup>(d)</sup> Applying this test, it was held that a draughtsman in a locomotive works was not a fellow-servant with a carpenter employed in "jobbing" for the proprietor, or with laborers engaged in excavating a cellar under the building, under the directions of the carpenter;<sup>(e)</sup> nor a carpenter in the service of a railway company, with those in charge of a train on which he is carried to and from his work;<sup>(f)</sup> nor a section hand, on a railroad several hundred miles in length, with the conductor and engineer of a train;<sup>(g)</sup> nor a laborer, employed by a stevedore to unload a vessel, with the mate.<sup>(h)</sup>

There are other American courts that deny the English doctrine upon this point, but base their conclusion upon different grounds. It is said that the master's exemption rests upon grounds of public policy—upon the expediency of throwing the risk of injury upon those who are best able to guard against the dangers. A master is not, therefore, liable for an injury inflicted by one servant upon another, where the two are co-operating with each other in a particular business at the time of the injury, or are, by their usual duties,

(b) 5 Eest & S. 570, 580; S. C. 33 Law J. (Q. B.) 260.

(c) 3 Sawy. 500.

(d) *Baird v. Pettit*, 70 Pa. St. 477, 482.

(e) *Baird v. Pettit*, 70 Pa. St. 477, 482.

(f) *O'Donnell v. Allegheny, etc.*, R. Co. 59 Pa.

St. 239.

(g) *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. 347.

(h) *Mullan v. Philadelphia, etc.*, S. S. Co. 78 Pa. St. 25. Whether they were fellow-servants was a question for the jury.

brought into habitual consociation, because they have the power of influencing each other to the exercise of constant caution in the master's work (by example, advice, and encouragement, and by reporting delinquencies to the master) in a great, and in most cases a greater, degree than the master. Where the servants have no opportunity for such influence over each other, the reason for the master's exemption no longer exists. Accordingly, in a recent case in Illinois, where this doctrine is elaborately considered and the authorities reviewed, it was held that a railway company was liable to a track repairer, who, while standing by the track, was struck and injured by a piece of coal carelessly thrown from the tender by the fireman of a passing train.(i) Similarly, an engine-driver of a railway has been held not to be a fellow-servant with a laborer in the company's carpenter-shop.(j) And the same doctrine has been held and applied in other states.(k)

FELLOW-SERVANTS, ALTHOUGH ONE IS SUBJECT TO THE AUTHORITY OF THE OTHER. SAID COCKBURN, C. J., in the case of *Howells v. Landore Steel Co.*:(l) "Since the case of *Wilson v. Merry*.(m) in the house of lords, it is not open to dispute that, in general, the master is not liable to a servant for the negligence of a fellow-servant, though he be the manager of the concern;" and the certified manager of a colliery, appointed under a statute, was held a fellow-servant with a worker in the mine. By the weight of authority in America as well as in England, the fact that the negligent servant is superior in authority to the injured servant, that he hires and may discharge him, and may direct him as to his work, does not enlarge or modify the master's liability.(n)

But this rule is not accepted, without modification, in this country. First. There are a number of authorities that hold that if the master has placed the entire charge of the business in the hands of an agent, exercising no authority and no superintendence of his own therein, such agent represents the master, and for his negligence the master is responsible to his servants.(o) "Owing to the fact that the business of corporations is transacted by means of agents, they would escape the just measure of liability, unless the rule applied to them. In this respect, both as to liability and for protection, they stand on the same footing with individuals."(p) Second. By other authorities the rule is denied altogether, and it is held that if the relation of superior and subordinate is shown to exist between the negligent and the injured servant, the latter being subject to the orders and contract of the former, the master is

(i) *Chicago, etc., R. Co. v. Moranda*, 98 Ill. 302.

(j) *Ryan v. Chicago, etc., R. Co.* 60 Ill. 171.

(k) *Cóoper v. Múllins*, 30 Ga. 146; *Louisville, etc., R. Co. v. Cavens*, 9 Bush, 559; *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

(l) L. R. 10 Q. B. 62.

(m) L. R. 1 Hl L. Sc. App. 321.

(n) *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Zeigler v. Day*, 123 Mass. 152; *Marshall v. Schrieker*, 63 Mo. 309; *Lawler v. Androsoggin R. Co.* 62 Me. 463; *Peterson v. Whitebreast Coal & Mining Co.* 50 Iowa, 673; *O'Connell v. Baltimore, etc., R. Co.* 20 Md. 212; *Malone v. Hathaway*, 64 N. Y. 5; *Curran v.*

*Merchants' Manufg Co.* 130 Mass. 374; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Keystone Bridge Co. v. Newberry*, 95 Pa. St. 246.

(o) *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Mullan v. Philadelphia, etc., S. S. Co.* 78 Pa. St. 25; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Kansas, etc., R. Co. v. Little*, 19 Kan. 269; *Malone Hathaway*, 64 N. Y. 5; *Beeson v. Green Mountain Gold Mining Co.* 57 Cal. 20.

(p) *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Howells v. Landore Steel Co.* L. R. 10 Q. B. 62; *Blackburn, J.*; *Allen v. New Gas Co.* 1 Exch. Div. 251.



liable;(g) Accordingly, a quarryman and the foreman of the quarry;(h) a brakeman and the engineer or conductor of a freight train;(s) a railroad laborer in building a culvert and the superintendent under whose orders he acted;(t) an architect and a superintendent, having general charge of the erection of a building, and a workman thereon;(u) the "section-boss" on a railroad and the workmen under him;(v) the conductor of a construction train and a boy of seventeen, employed as a laborer on the train,(w)—have been held not fellow-servants. *Third*. The test laid down by the New York courts is, that, in order to charge the master, the superior servant must so far stand in the place of the master as to be charged with the performance of duties towards the inferior servant, which, under the law, the master owes to such servant.(x) In the late case of *Crispin v. Babbitt*,(y) where it was left to the jury to determine whether the "business and financial man" in charge of the defendant's iron works was a fellow-servant with the plaintiff, a laborer in the works, who was injured by the act of the agent in carelessly turning on the steam of an engine by which the plaintiff was standing, Judge RAPELLO states the New York rule thus: "The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master which he has confided to such inferior employee. \* \* \* The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance." Hence, as it is the master's duty to furnish his servants with reasonably safe machinery and to keep the same in proper repair, the agent or servant to whom he delegates this duty is not the fellow-servant of the one who uses the machinery, as has been decided in a large number of cases,(a) though the contrary is maintained in England and in some American courts.(b) The inspector of the machinery and appliances of a

(g) *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Pittsburgh, etc., Ry. Co. v. Devinney*, 17 Ohio St. 197, 210; *Knoxville Iron Co. v. Dodson*, 7 Lea.

(h) *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205.

(t) *Berea Stone Co. v. Kraft*, 31 Ohio St. 257.

(s) *Hofnagle v. New York, etc., R. Co.*, 55 N. Y. 608; *Fiske v. Boston, etc., R. Co.*, 53 N. Y. 519.

(u) *Cowles v. Richmond, etc., R. Co.*, 84 N. C. 260; *Compare Pittsburgh, etc., Ry. Co. v. Lewis*, 33 Ohio St. 186.

(v) *Fuller v. Jewett*, 80 N. Y. 46; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38; *Wedgwood v. Chicago, etc., R. Co.*, 41 Wis. 478; *Shanny v. Androsburg Mill*, 66 Me. 420.

(w) *Kansas, etc., R. Co. v. Little*, 19 Kan. 269.

(x) *Whalen v. Centenary Church*, 62 Mo. 226.

(y) *Lou'ville, etc., R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866.

(a) *Columbiana, etc., R. Co. v. Arnokk*, 31 Ind. 174; *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411; *Harrison v. Central R. Co.*, 21 N. J. Leg. 233; *Waller v. South-eastern R. Co.*, 2 Hurl. & C. 102;

railroad is not a fellow-servant with the brakeman of a train, (c) or with the engineer. (d) But the workmen employed in a machine-shop of a railway company are fellow-servants, so that if a boiler, sent to the shop for repair, explodes and injures a workman by reason of the negligence of another workman through whose hands it has passed in course of repair, the company is not liable, though it would have been otherwise had it been placed in the hands of an employe for use. (e)

WAYLAND E. BENJAMIN.

Searle v. Lindsay, 11 C. B. (N. S.) 429; Conway  
v. Belfast, etc., R. Co. 1 R. 9 C. L. 498.  
(e) Long v. Pacific Railroad, 65 Mo. 226.

(d) Darkin v. Sharp, 88 N. Y. 225.  
(e) Murphy v. Boston, etc., R. Co. 88 N. Y. 146.

### FLETCHER v. NEW YORK LIFE INS. CO.\*

(Circuit Court, E. D. Missouri. September 23, 1882.)

#### 1. CORPORATIONS—AGENT—ACTS, WHEN BINDING.

Corporations are held to whatever is within the apparent scope of their agents' powers, unless parties with whom such agents contract have notice that their powers are limited.

#### 2. INSURANCE—APPLICATION—FRAUD.

Where a party desiring insurance upon his life signed an application which contained an agreement that the statements and representations therein should be the basis of the contract, and warranted their fullness; and which also contained an agreement that no statements, representations, or information made or given by or to the person soliciting or taking his application for a policy, or to any other person, should be binding on the company, or in any manner affect its rights, unless such statements, representations, or information were reduced to writing and presented to the officers of the company, at its home office; and where such application contained two false answers material to the risk, which had been written therein by the agent of the company who examined the applicant and took his application: held, that no suit could be maintained on the policy in case of the assured's death unless it were proved that the assured's answers to the questions to which false answers had been inserted, were true; that the false answers had been inserted by the company's agent without the assured's knowledge; and that such agent concealed from the assured what he had written in the application, and induced him to sign it without knowing what it contained.

#### 3. SAME.

Parol evidence is admissible in such cases to show fraud on the agent's part.

#### 4. SAME—CONCEALMENT OF AGENT'S FRAUD.

Where an applicant for insurance discovers before the policy is issued, or the first premium paid, that the company's agent has obtained his signature to an application containing false answers, it is his duty to go no further in the transaction; but if he does not make the discovery until after the policy has been issued and the first premium paid, he is not bound to take any steps to have the policy canceled.

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

Suit upon a policy of insurance upon the life of C. S. Alford, deceased, by his executor, Thomas C. Fletcher, for \$10,000 and interest. A new trial having been granted therein, (see 12 FED. REP. 557,) this case was a second time tried before a jury. Evidence having been introduced by the defendant tending to prove that two answers, contained in Mr. Alford's application for insurance, were false, the plaintiff offered parol evidence, which was admitted, tending to prove that the applicant's answer had been true; that the false answers had been inserted without his knowledge by the agent who took the application; that the applicant signed the application, supposing it contained his answers as given; and that his signature thereto was obtained by the company's agent by fraud. For a report of the first trial see 11 FED. REP. 377. For a report of opinion on demurrer to the replication see 13 FED. REP. 526.

*George D. Reynolds*, for plaintiff.

*Overall & Judson*, for defendant.

*MCCRARY, C. J., (orally.)* The principal facts in this case are not disputed. The matters for your consideration will fall within a very narrow compass. It is therefore not necessary that the court should charge you at any great length.

It is admitted that this policy of insurance was executed by the defendant company; that it was a policy upon the life of CHIRONDA S. Alford; that Mr. Alford died, having paid his premiums up to the time of his death; that the plaintiff here is his executor, and is entitled to recover, if a case has been made out upon the contract. The defense is that the applicant for insurance, Mr. Alford, at the time of making his application, made certain statements in writing, in the application, which were untrue and which were material.

It is said that he represented to the agent of the company that he never had any disease of the kidneys; that he represented that he never had an attending physician; that in all respects his application was untrue; and, these being material matters, it is claimed that the contract based upon them is void. In answer to this, it is said that, although there is a writing containing these representations, and although it is signed by the assured, Mr. Alford, yet that writing was obtained from him by fraud on the part of the agent of the insurance company. The law is that an insurance company, like any other person, natural or artificial, may appoint an agent, and may put limitations upon the powers of the agent, provided knowledge or notice of these limitations be brought home to the party with whom the agent contracts; otherwise the principal—in this case the insurance

company—is held to whatever is the apparent scope of the agent's authority. This doctrine is invoked here, and is applicable to a certain extent, and only to a certain extent. There is a limitation in this contract upon the power of the insurance agent. The company is not to be bound by any representations made to or by the agent, unless these representations are put in writing and submitted to the company. Therefore, what is contained in this application, although the answers were not truly recorded, would be regarded as constituting the basis of this contract, unless it can be avoided for fraud. Consequently the question for you to determine is whether there was a fraud in the procuring of this policy of insurance by the agent of the insurance company; and upon that subject I will state what I understand to be the correct rule. If the jury find from the evidence that at the time of making the application Mr. Alford told the agent of the defendant that he, Alford, had had *diabetes*, and referred him to his physician concerning it, and that such agent committed a fraud upon Mr. Alford by inserting false answers in the application and suppressing the answers actually given, and by concealing from him what he, the agent, had written in the application, thereby inducing him to sign said application without knowing what it contained, then the plaintiff is not estopped to recover.

You will see, gentlemen, that there are two things to be shown: *First*, that the assured, Mr. Alford, made true representations with regard to this matter of his having had a disease, and his having had an attending physician; *secondly*, it must appear that the agent of the company, for the purpose of inducing him to insure, for the purpose of obtaining from him the premium which he was to pay, falsely inserted in the application answers which he did not give; and then it must also be shown that Mr. Alford signed the application in ignorance of the fact that his answers had not been truly recorded in it.

If all these appear, then there is a case of fraud established. The burden of proving fraud is upon the plaintiff. The presumption is that the paper which was signed by Alford contained his true answers, and that presumption must be overcome by proof offered here by the plaintiff. I think that is really the only question that there is for your consideration—the question of fraud.

There is another point made by counsel which deserves notice. If the plaintiff ascertained before the contract was consummated that this fraud had been practiced upon him by the agent, it was his duty then to stop and to go no farther; that is, if at any time before

the policy was delivered to him, and the first premium was paid, he discovered that the agent had committed a fraud upon him and upon the company, because it was a fraud both upon the assured and the company, then it was his duty to stop, and to decline to go any further with the transaction. But I think if he did not discover before the policy was delivered and the first premium paid, that he was not called upon after that to take any steps for the cancellation of the contract. The defendant has tendered here in open court the sum of \$888.26. You will, in any event, return a verdict for that amount. The court will make such order with regard to costs as may be considered right, after you have returned your verdict, if you give no more than that.

The question for you to determine is whether the whole amount of this policy is due, or whether your verdict is to be only for the amount tendered, which is \$888.26. If you find for the plaintiff in the whole amount, you will give him interest at the rate of 6 per cent. per annum from 60 days after the date when the proof was filed, and that date is the fourteenth of December, 1880, so that interest would begin to run from the fourteenth of February, 1881. You will have to bear in mind these dates.

Your verdict, therefore, will either be for the sum of \$888.26, or for the amount of the policy, with interest from February 14, 1881.

The jury rendered a verdict for plaintiff for the amount of the policy, with interest, and the defendant thereupon took an appeal to the supreme court.

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THOMAS v. LENNON.

(Circuit Court, D. Massachusetts. January 19, 1883.)

1. COPYRIGHT—DEDICATION—SCOPE OF.

A dedication to the public of the arrangement of a musical composition for the piano does not dedicate what it does not contain and what cannot be reproduced from it, and defendant does not, therefore, possess and has no right to perform such composition as set for an orchestra, although he should have the opportunity to copy it.

2. SAME—MUSICAL COMPOSITION—RIGHTS OF COMPOSER.

An opera is more like a patented invention than a common book, as to the rule that he who obtains similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer.

## 3. SAME—INJUNCTION.

Where defendant has undertaken the representation of plaintiff's full score, and has hastened his preparations and changed the day to an earlier one for the purpose of anticipating the performance of plaintiff's assigns, a motion to enjoin its performance will be granted.

In Equity.

*Browne, Holmes & Browne*, for complainant.

*T. W. Clarke and J. H. Burke*, for defendant.

Before LOWELL and NELSON, JJ.

LOWELL, C. J. This is a motion to enjoin the defendant from causing to be performed Gounod's oratorio, or cantata, called "The Redemption," with full orchestral accompaniment. The plaintiff is a citizen of New York, and the defendant is a citizen of Massachusetts. The hearing was on the bill, the answer, (to be taken as an affidavit,) a stipulation of the parties, and oral evidence of experts. Charles Gounod, of Paris, composed the oratorio in question, with an orchestral accompaniment for 40 or more pieces, and caused it to be performed for the first time, under his own direction, at Birmingham, in England, in August last, on occasion of a musical festival. The defendant avers his belief that the full score has been published in England, but he adduces no proof of this, and the stipulation finds that this belief rests only upon the understanding that the law of England requires a deposit of a copy of the score in the British Museum within three months after the first performance. The law appears to make this requirement unless the score is in manuscript; but we have no evidence whether the score was or was not in manuscript at the time when it should have been deposited if not in manuscript, nor whether it was so deposited, and, if so, whether it is open to public inspection. There is evidence that at some time, not specified, except that it was before the answer was filed, a few copies have been printed, marked "as manuscript only," for the use of the performers. We do not need to decide whether these copies were manuscript in the sense of the statute. There has been time, since the defendant first undertook to act as if the oratorio was open to him, to ascertain the true circumstances of the case in respect to this supposed publication. The composer did permit the words and vocal parts of his oratorio, set to an accompaniment for the piano, to be published in England; and the book can be bought in Boston, and has been produced in evidence. It is believed and admitted to contain all the melodies and harmonies of the original oratorio. It has, in the margin, references to the particular instruments which are to

be employed in playing the different parts of the piece, or many of them. The plaintiff owns for this country whatever exclusive rights Gounod retained or could retain after the publication of the book. The defendant applied to the plaintiff to buy the exclusive right of performing the oratorio in Boston, but was told that negotiations were pending with the Handel and Haydn Society, of this city, for that right. These negotiations resulted in a purchase by that society. The defendant appears to have gathered, from something which was said to him by the plaintiff, that the negotiations with the Handel and Haydn Society were likely to fall through, and to have begun his preparations as if this were already sure. When he heard that the bargain was made, he undertook to proceed, and to advance his performance so as to bring out Gounod's "Redemption" before the time fixed by the society for their first performance, and accordingly advertised his own for next Sunday, January 21st. Thereupon this bill was filed, and the defendant modified his advertisement, by advice of counsel, so that, in the part material to this case, it read thus:

BOSTON THEATER.

SUNDAY EVENING, JANUARY 21, 1888,

First Performance in Boston of

GOUNOD'S REDEMPTION,

With New Orchestration arranged from

indications in the published

Piano-forte Score.

It is admitted, for the purposes of this motion, that the defendant has not copied Gounod's score, but has procured the band parts to be made by some unnamed composer or arranger of music.

Two questions have been ably argued before us: *First*, whether the publication of the book, with the score for the piano and the marginal notes, gives to every one the right to reproduce or copy the orchestral score if he can; *second*, whether a new orchestration, not copied from the original by memory, report, or otherwise, but made from the book, is an infringement of the plaintiff's rights. These were the points argued, for it was admitted that a performance on the stage is not such a publication as will destroy the exclusive common-law right of the author and his assigns to a dramatic or lyrical composition of this sort, though the composer is an alien, not entitled to the benefits of our law of statutory copyright. *Keene v. Wheatley*, 4 Phil. 157; *Boucicault v. Fox*, 5 Blatchf. 87; *Crowe v. Aiken*, 2 Biss.

208; *Palmer v. De Witt*, 47 N. Y. 532; *Tompkins v. Halleck*, 133 Mass. 32.

1. It is clear that the book is common property in the United States. What does it dedicate to the public? It was to instruct us upon this point that experts were examined; and their opinions were unanimous that the score for the piano contains all the substance of the oratorio, but that the limitations of the instrument are such that it is impossible to express in such a score what the orchestra expresses with its various instruments, and that any one who adapts such a score for an orchestra must add a great deal to it, not in the way of new harmonies and melodies, but in the way of carrying out and applying them to produce the proper effects upon notes and combinations impossible for the piano. An orchestration can be made from the score by a competent arranger, and several such may be found in Boston, but the precise effects, called by the witnesses "color," which a composer gives to the orchestral parts cannot be reproduced, because the possible variations which may be produced by slight changes in the use of the several instruments are infinite. Twelve composers would make 12 different orchestrations. It may be doubted whether Gounod himself could reproduce it, if we can suppose him to have no aid from memory. We understand by this evidence that all the oratorios thus made would be somewhat like the original, and all would differ more or less from it. It is conceivable that some one might be considered better than Gounod's, if made by an abler composer than he; but the chances are that they would be much worse; and all might be, properly enough, called imitations of his work. These being the facts, we consider it to be clear that a dedication to the public of the arrangement for the piano does not dedicate what it does not contain, and what cannot be reproduced from it. Therefore, the defendant does not in fact possess, and has no right to perform Gounod's "Redemption" as set for an orchestra. If he should have the opportunity to copy it he would not be permitted to perform it.

2. We find more difficulty in deciding whether the plaintiff's rights are infringed by a new orchestration. It is held in England that the publication of precisely such a book as this does not authorize a person, without license, to do precisely what this defendant has done. This was the law of England when the book was published. *Boosey v. Fairlie*, L. R. 7 Ch. Div. 301; affirmed, 4 App. Cas. 711. A similar decision was announced in this country in 1882, in a very able and



vigorous opinion by Chancellor TULEY, of the circuit court of Cook county, Illinois. *Goldmark v. Collmer*, (printed by itself in a pamphlet.) In the English case there was no dissent in either the court of appeal or the house of lords, and the decision of the vice-chancellor, which was reversed, was on a technical point of registration, though he did intimate that any one might take the music by memory, if there were no copyright, which is not the law of this country. Still, in that case, the infringement was almost taken for granted. The argument against it, which was urged here, and is given by Drone in his able and suggestive work on Copyright, 609, is this: "By the ordinary law, applying to books, any one may make such use as he can of what he finds in a copyrighted work, if he does not copy from it; *a fortiori*, if he can reconstruct an opera or oratorio from a book which is common property, without copying the orchestral score which is protected, he is blameless."

This argument has a logical and consistent appearance, but, as applied to a musical work of this kind, the practical objections are very great. Such a work is a single creation, of which the orchestration is an essential part; every reproduction of it from something else is necessarily an imperfect imitation, which, nevertheless, occupies the same field, and may ruin the original. In this respect an opera is more like a patented invention than like a common book; he who shall obtain similar results, better or worse, by similar means, though the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer. This view of the subject is very well stated by Chancellor TULEY. Another practical point of some importance is that it would be very difficult to prove, in many cases, whether memory had not had some part in the reproduction. If necessary to the logic of the argument, we might, perhaps, hold that the publication of the piano score is a restricted dedication of that and nothing more. This seems to be the opinion of the English judges, for they appear to have thought that the exact orchestration could be written from the book by any skilled arranger.

*Lastly.* It is plain that the defendant has undertaken to represent Gounod's full score. Even his modified advertisement, while it may notify experts that the reproduction cannot be exact, is calculated to express to the public that Gounod's work in its entirety is to be performed by him for the first time in Boston; and he hastened his preparations and changed the day to an earlier one for the very purpose of anticipating the performance by the plaintiff's assigns. Under these circumstances infringement appears to us to be sufficiently ad-

mitted for the purposes of this motion, even if it were otherwise doubtful.

Motion granted.

See *Hubbard v. Thompson*, 14 FED. REP. 689; *The "Mark Twain" Case*, Id. 728; *Yuengling v. Schile*, 12 FED. REP. 97; *Mackaye v. Mallory*, Id. 328; *Chapman v. Ferry*, Id. 698, and note, 696; *Ehret v. Pierce*, 10 FED. REP. 553; *Burton v. Stratton*, 12 FED. REP. 696, and note, 704; *Shaw Stocking Co. v. Mack*, Id. 707, and note, 717.

### THE CHASE.

(District Court, S. D. Florida. December, 1882.)

#### 1. STATE PILOTAGE LAWS.

State laws conferring upon local boards power to fix rates of pilotage are not void as granting powers which may not be delegated.

#### 2. SAME.

They are enacted by a power originally within the states and not by that conferred by the United States.

#### 3. SAME.

They need not be general and uniform throughout the state, but may be regulated according to local needs.

#### 4. SAME—POWER TO FIX RATES.

The power to fix and determine rates also authorizes the determining what proportion of the regular rates may be demanded when services are tendered and not accepted.

#### 5. STATUTE—REPEALING CLAUSE.

It is not necessary that a repealing clause be embodied in an act; if the substance of the previous act is inconsistent with that of the subsequent one it is repealed by implication.

In Admiralty.

*W. C. Maloney, Jr.*, for libellant. *G. Bowne Patterson*, for respondent.

LOCKE, D. J. The legislature of Florida, by the act of February 27, 1872, established a certain schedule of rates of pilotage, which should be paid a pilot by any vessel entering any port of the state, when spoken, whether his services were accepted or not; but by the act of March 7, 1879, it subsequently declared that the several boards of pilot commissioners for the several ports of the state should determine the rates of pilotage which should be paid by any vessel at their ports, such rate not to be greater than those then provided.

Under this act the pilot commissioners of the port of Key West established a set of rules and regulations fixing a schedule of rates, and providing that whenever a vessel was spoken, and the services of a pilot were not accepted, the vessel should be compelled to pay but one-half the regular rates.

It is alleged, and not denied, that the libeled vessel in this case was spoken while leaving port on a foreign voyage, but did not accept the services of the pilot, and the only question is whether the pilot libeling is entitled to full rates, under the first act of the legislature, or but half the amount, under the regulations of the board of the pilot commissioners.

It has been earnestly contended in behalf of the libellant that the state has acted by authority delegated by congress, and the legislature had no power to redelegate it to any inferior body; that the constitution of the state requires that all laws shall be general and not local; and that since the original act was not repealed by any positive repealing clause it is still in force and takes precedence. The act of congress of August, 1789, re-enacted in section 4235, Rev. St., declares that "all pilots in \* \* \* the ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, \* \* \* or with such laws as the states may respectively enact for the purpose."

Questions involving this same subject, if not the exact point, have been before the supreme court in several cases; and frequently referred to in opinions upon kindred matters. The question which has brought the matter of pilotage legislation at all under the jurisdiction or control of the federal government, has been that it was a regulation of commerce, and the power of making such regulations had been by the constitution delegated to congress. The first case in which the question was discussed was *Gibbons v. Ogden*, 9 Wheat. 207. The language of the court there was:

"Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence it found a system for the regulations of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. The act unquestionably manifests an intention to leave this subject entirely to the states until congress should think proper to interfere."

Again, in *Cooley v. The Board of Port Wardens of Philadelphia*, 12 How. 299, it is declared:

"Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first congress that the nature of this subject is such that until congress should find it necessary to exert its powers, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. It manifests the understanding of congress at the outset of the government that the nature of this subject is not such as to require its exclusive legislation. The practice of the states and the national government has been in conformity with this declaration from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of its superior fitness and propriety, not to say absolute necessity of different systems of regulations, drawn from local knowledge and experience, and conformed to local wants."

The question was further discussed in the case *Ex parte McNeil*, 13 Wall. 241, in which the doctrines of *Cooley v. The Port Wardens* was reaffirmed. See, also, *Cribb v. State*, 9 Fla. 409.

In *Jones v. Clifford's Ex'r*, 5 Fla. 513, the court cites the act of 1822, in which the board of port wardens had power "to establish such ordinances as they shall deem advisable, with the power to fix and alter the rates of pilotage," and apparently approve and recognize the validity of it. I am satisfied that the establishment of local boards with power to fix and determine the rates of pilotage for the several ports of the state, and to decide which vessels, if any, may pay half and which whole rates, is in no way in conflict with the provisions of any act of congress.

If further reasons were necessary upon this point, the health laws of the several states, wherein powers are delegated to local boards, might be referred to, and reasoning from analogy establish the same point. The United States statutes relating to public health are, if possible, more explicit in speaking of the health laws of any state, and by no words do they recognize the local health laws of ports or cities; yet all local health laws made in conformity with state statutes are recognized by all departments of the general government, and treated with as much respect as they could be were they enacted by the legislators, and among the many questions which have arisen upon this subject, and regarding the conflicting interests of commerce, or local health, its fees, delays, and annoyances, I have been unable to find that any objection has been made to a local or municipal law, when

in accordance with the health laws of a state, because the actual *minutiae* of the regulations were not determined by the legislature.

The only provision of the state constitution that could have any effect upon such delegation of powers is that of section 18, art. 4, which provides that "in the several cases enumerated in the preceding section, and in all others when a general law can be made applicable, the law shall be general and uniform throughout the state."

Except "in the cases enumerated," it is a question for the legislature to decide whether a general law can be made applicable, to the best advantage, and the passing of a local one would be a declaration that in its opinion the local law would be better; and I doubt if any court would interfere unless the law was one so positively in opposition to the spirit of the constitution as to be unquestionable.

But has the legislature enacted a local law touching this matter? The law relied upon is as general in its character as any one could be; as general as the laws that permit the county commissioners to determine their compensation or the salary of the county solicitor, or the board of instruction to establish the pay of the county superintendent. There may be under each of these laws as many different results as there are counties in the state. I do not consider it so a local law as to come under the prohibition of the clause of the constitution.

Although the later act did not by actual words repeal the former one, yet there can be no question but what it was the intention of the legislature to leave the entire matter in the hands of the local boards. The spirit of the law is to be considered, and if it is found to be in conflict with the pre-existing law it virtually repeals it as fully as if it did so by a direct repealing clause, and of that in this case there can be no question.

Since the organization of the state government no less than 25 acts have been passed upon this subject, and by a large majority of these local boards have been given full and complete powers to make rules and regulations, establish rates and change the same, as deemed best; and under them full power in regard to compensation has been claimed and exercised. In no case has the right to fix rates been held to be separate from the question of compulsory pilotage, nor has either question been passed upon or treated separately.

It was not the question of the rate per foot that brought about the act of 1879, but that of compulsory pilotage, either half or whole rates. The amount which was to be paid a pilot who had rendered service has never been objected to or deemed unreasonable, but the

conflict has been between the representatives of those vessels which did not employ pilots and the pilots themselves; and leaving the entire matter to the local boards, as had been the case under three-fourths of all the previous legislation upon the subject, was, without doubt, the quickest and most satisfactory manner of determining it.

In my opinion it was the intention of the legislators that the local boards should have power, not only to determine what rates should be paid by a vessel employing a pilot, but also by one spoken that does not accept services. The question of rights of pilots under a tender and refusal of services has been settled, and it declared that there is an implied promise to pay the amount determined to be due in accordance with law. It is not a right or penalty given by a local board.

The state law has given a substantial right for an amount which may be measured and determined by such commissioners, and enforced by an admiralty court as it might enforce any other implied marine contract. That amount in this case is the half of the usual rates, and the decree will follow accordingly. *Vide Wilson v. McNamee*, 102 U. S. 572.

See *The Alzena*, 14 FED. REP. 174, and note; *The Francisco Garguilo*, Id. 495; *The William Law*, Id. 792; *The Whistler*, 13 FED. REP. 295; *The Clymene*, 12 FED. REP. 346; *The Lord Clive*, 10 FED. REP. 135; *The Glaramara*, Id. 678.

### ROSS v. BOURNE.

(District Court, D. Massachusetts. January 19, 1883.)

#### SEAMEN'S WAGES—RIGHTS TO SUE IN ADMIRALTY.

In the absence of express legislation on the subject by congress, the right of a seaman to sue in the admiralty *in personam* for his wages is not taken away or suspended by an attachment of his wages by trustee process in an action at law.

#### In Admiralty.

*C. T. Bonney* and *T. A. Codd*, for libellant.

*E. L. Barney*, for respondent and the attaching creditor.

NELSON, D. J. This is a libel *in personam* for seamen's wages. The libellant alleges that on the sixteenth of June, 1882, he shipped as boat-steerer in the whaling bark *Helen and Mary*, of New Bedford, of which the respondent is owner, then lying at Marble island, in Hudson's bay, in the prosecution of a whaling voyage, at the one

sixty-fifth lay in the subsequent catchings of the voyage; that the bark continued her voyage with the libelant on board, and took a large quantity of oil and bone, and finally returned home to New Bedford, where she arrived October 3, 1882, and the voyage then ended; that by his shipping agreement his lay was to be paid him at the termination of the voyage; and that he had demanded payment of his lay and it had been refused. The respondent, in his answer, admits the allegations of the libel, and avers that his only reason for not paying the libelant is that on the third of October, 1882, after the voyage had terminated and before the filing of this libel, the wages were attached by a trustee process against the libelant at the suit of Simeon Doane and another, returnable to the superior court for the county of Bristol on the first Monday of December, 1882, and that the trustee process has been entered in that court and is still pending. It is agreed that the amount due the libelant as wages is \$182.12.

Section 61 of the shipping commissioners' act of June 7, 1872, (17 St. 276; Rev. St. § 4536,) enacts "that no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to any seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, incumbrance, or arrestment thereon." This provision is general in its terms, and is applicable to all wages earned by seamen, whatever the nature of the voyage. But by the act of June 9, 1874, (18 St. 64,) it was enacted "that none of the provisions" of the act of June 7, 1872, "shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage." The effect of this act is undoubtedly to take fishing and whaling voyages, where the seamen receive as their compensation a share or lay in the catchings, wholly out of the operation of the act of 1872. This has been frequently so ruled in this district. It has also been so ruled as to coastwise voyages between ports on the Atlantic. *Scott v. Rose*, 2 Low. 381; *U. S. v. Bain*, 5 FED. REP. 192; *Eddy v. O'Hara*, 132 Mass. 56.

The question in the case, then, is whether, in the absence of express legislation on the subject by congress, the right of a mariner to sue

in the admiralty for his wages is taken away or suspended by an attachment of his wages by trustee process in an action at law.

The thirteenth admiralty rule provides that "in all suits for mariner's wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone, *in personam*." No one would for a moment contend that the attachment suit should have the effect to deprive the seaman of his lien on the vessel and freight. But to avail himself of that privilege he must necessarily resort to a court of admiralty, where alone the lien can be enforced. *The Caroline*, 1 Low. 173. In *Winthrop v. Carleton*, 8 Mass. 456, it was held that it was no cause to abate a writ that the defendant had been sued as the trustee of the plaintiff, and the trustee process was still pending, but was ground for a continuance only. The court say: "*Non constat* that judgment will be rendered against the defendant in the other suit." I shall not err if, following the decision in that case, I hold that the seaman's right to sue the owner *in personam* in the admiralty is not taken away by the trustee suit.

Is a court of admiralty under obligation to suspend its decree while the trustee suit is pending? The right of the seaman to sue in the admiralty for his wages is as old as the admiralty itself. Prior to 1872 there was no act of congress prohibiting the attachment of wages earned on foreign voyages, and it was for a period less than two years that the prohibition extended to coastwise and to fishing and whaling voyages. Yet the recent case of *McCarty v. The City of New Bedford*, 4 Fed. Rep. 818, decided by Judge BENEDICT, is the first reported instance of an attempt to delay a seaman in pursuit of his wages in the admiralty by an attachment by trustee process. In that case the learned judge held that seamen's wages were not attachable under the general maritime law, and he pronounced for the seaman, notwithstanding an attachment of the libellant's wages by trustee process was pending in a state court. That such a debt is not exempt from attachment at common law seems to be the law of Massachusetts, though the point has never been directly adjudged. *Wentworth v. Whittemore*, 1 Mass. 471; *Taber v. Nye*, 12 Pick. 105; *Eddy v. O'Hara*, *ubi supra*; 2 Dane, Abr. 463; Cush. Trust. Proc. 38. At least it would seem to be clear that a judgment of a court of competent jurisdiction charging the trustee, and a payment by him under the judgment, would be a defense *pro tanto* in a court of admiralty, as in any other court, to a suit by a seaman for his wages, whether against the ship and freight, or the owner or master *in personam*. But it is a very



different question whether the admiralty court is bound to withhold its decree until the trustee suit is disposed of. By the trustee statute of Massachusetts, if during the pendency of an action the defendant is summoned as the trustee of the plaintiff, it is wholly within the discretion of the court to permit the action to be stayed for the trustee suit, and the court can order judgment in the first suit or continue it, as it sees fit. Pub. St. c. 183, § 40.

We have seen that the pendency of the suit is no ground for abatement, (*Winthrop v. Carleton*;) and in *Merriam v. Rundlett*, 13 Pick. 511, it was decided that a judgment against one as garnishee in a process of foreign attachment in another state is not a bar to an action against him in this state by the principal defendant, if the garnishee has not satisfied and may not be obliged to satisfy the judgment, but that it was good ground for a stay of proceedings only.

In *Stanton v. Embrey*, 93 U. S. 548, the pendency of a prior suit in a state court was held not to abate a suit in a federal court between the same parties for the same cause of action; and in Massachusetts a prior action for the same cause in another state is not ground for abatement. *Newell v. Newton*, 10 Pick. 470; *Merrill v. New England Ins. Co.* 103 Mass. 245.

In *Merriam v. Rundlett* it is said by Chief Justice SHAW that "it has been well settled in this commonwealth that a judgment against a garnishee in another state, when the court has jurisdiction of the person and of the subject-matter, will protect one here who has been obliged to pay or is compellable to pay in pursuance of such judgment, although it be a debt due on a promissory note or other negotiable security, although no such judgment would have been rendered against a garnishee or trustee under our laws, and although such law appears to us a little unreasonable."

In *Eddy v. O'Hara* it was adjudged that where the wages of a seaman had been attached by trustee process in a court of this state, and the trustee had afterwards been compelled by proceedings in a court of admiralty against the vessel to pay the attached wages to the defendant, notwithstanding his disclosure in the admiralty suit of the pendency of the trustee process, the trustee should be discharged, and should not be compelled to pay the same sum a second time. Under these decisions the respondent can suffer no detriment in the trustee suit from a decree rendered against him here.

It was held by Judge LOWELL, when district judge, in *The Sarah J. Weed*, 2 Low. 555, dissenting upon most satisfactory grounds from a contrary decision of Judge CONKLIN, in *The A. D. Patchen*, 21 Law

Rep. 21, that the lien of a seaman passed by an assignment of his wages. This decision of Judge LOWELL has been repeatedly followed here, and is undoubtedly the law of this circuit. Judgment against the trustee might therefore have the effect to transfer to the attaching creditor, by way of subrogation, the seaman's lien on the ship and freight. Such complications ought not to be permitted in suits for seamen's wages. The seaman should have his wages settled promptly. If the owner or master does not pay him, a court of admiralty should afford him a simple, speedy, and inexpensive remedy. The necessities of his occupation, his want of friends and means, and the small sums usually coming to him, would, in most cases, render him incapable of following his claim through the double proceeding, and compel him to abandon it altogether. This would furnish an inducement to dishonest owners and masters to instigate or encourage the bringing of trustee suits to defraud the seamen.

I am aware of no law of congress, or rule or practice in admiralty, which requires this court to hang up its decree in this case until the attachment suit is disposed of. Ordinarily the sailor's only means of subsistence on shore are his wages earned at sea. If these may be stopped by an attachment suit the instant his ship is moored to the wharf, a new hardship is added to a vocation already subject to its full share of the ills of life. Wages earned amidst the perils and hardships of the whale fisheries, and payable only at the end of a voyage usually lasting for years, should of all others be paid promptly when due.

So far as I have any discretion, I shall decline to exercise it to prevent the libelant from recovering his wages.

Decree for the libelant for \$132.12.

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### THE LOUIE DOLE.

(Circuit Court N. D. Illinois. January 6, 1883.)

#### 1. SERVICES—APPLICATION OF PAYMENT.

Where services were continuously performed on a vessel by libelant as engineer and wheelsman and pilot during a series of years, there is no distinction existing in the law of maritime liens as to such services; and the mode of appropriating payments from time to time made to libelant, in the absence of a special agreement, would be to the oldest service performed, and the balance claimed by libelant may be considered as accruing from the service most recently performed.

## 2. SAME—LIEN NOT WAIVED.

Where the owner had repeatedly promised to pay the claim, and he had gone into bankruptcy and libellant was informed that affected the validity of his claim, the fact that the bankrupt had scheduled the claim as a personal demand against himself could not prejudice the right of libellant to enforce his lien against the vessel, nor would the presentment of the claim by libellant to the bankrupt court be considered of itself a waiver of his lien.

## 3. SAME—NOT WAIVED BY DELAY.

Where the purchaser of a vessel had information sufficient before or at the time of his purchase, as in this case, to put him on inquiry as to any liens which might exist against the vessel, the fact that proceedings were not instituted against the vessel till after the purchase, would not operate as a waiver of the lien which originally existed.

## In Admiralty.

*J. S. Reynolds and Magee & Adkinson*, for libellant.

*C. E. Kremer*, for defendants.

DRUMMOND, C. J. The libel in this case was filed on the sixth day of May, 1878, against the steam tug-boat *Louie Dole*, to recover compensation for services rendered by the libellant on board of the tug from April 6 to July 4, 1876, as engineer; from July 21 to November 11, of the same year, as wheelsman and pilot; and also for services rendered in March, 1877, on board of the tug as engineer, in fitting her out. On the seizure of the tug upon a monition issued, it was released, and a claim, as owners, was put in by Frederick Medynski and William G. Drinkwater. A decree was given in favor of the libellant by the district court, but holding that the five-sixteenths of Drinkwater were not liable for the amount of the decree, from which one of the claimants, Medynski, has appealed. The facts, as shown by the proof, seem to be substantially as follows:

At the time of the performance of the services mentioned, Jesse Cox was the managing owner of the tug, and a contract of service was made between him and the libellant, by which, for the first period named, the libellant, as engineer, was to have \$110 a month; for the second period, as wheelsman and pilot, \$145 a month; and for the last period \$31.77; the whole balance claimed to be due, at the time the libel was filed, being \$406.01.

It is not controverted that the services were performed by the libellant as stated, and the evidence clearly shows that the compensation named was agreed to. In March, 1877, Medynski purchased five-sixteenths interest in the tug, and in April, 1878, the other eleven-sixteenths; the other claimant purchased the interest which he had from Medynski. In July, 1876, a verbal agreement of charter was made between Cox and the libellant, and a man by the name of Kibbe, by which the libellant and Kibbe were to run the tug for five dollars a day, to be paid for her use. It was understood at the time a written contract or charter should be made, which, however, was never drawn up. The contract seems not to have resulted very profitably for the parties, because

when it came to be terminated it was ascertained that there were several unpaid bills against the tug, and as a result of this it was agreed between the parties, and particularly between Cox and the libelant, that the contract of charter should be considered as abandoned, and that for the services rendered by the libelant during the running of the charter, which was only a few months, compensation should be given as wages, the libelant never having received any portion of the profits, if any were made, during the time of the charter.

The defendants claim, under this state of facts, that the action of the libelant was stale, because the libel was not filed until May, 1878, more than two years from the time that the service commenced; and because, for a portion of the time when the service was rendered, it was under the charter which has been already referred to; and it is claimed by the defendants that they had no notice of the account of the libelant against the vessel at the time they made the purchase, and that during all the time from the spring of 1876 until the spring of 1878, the tug was here in the port of Chicago, subject to seizure at any time, if a maritime lien existed against her on the part of the libelant. It is admitted by the defendants that there was a small balance due the libelant for the services performed in fitting out the tug in March, 1877, which, it is alleged, has been tendered to the libelant.

The evidence from the books of account, which were kept by Koehler, one of the witnesses, and in which the entries were made crediting libelant with the services performed, and with the money that was paid to him from time to time, does not appear to be in the record in this court, though referred to by some of the witnesses; but it is a fair inference, from the statements made by several of the witnesses, that the account was a continuous account. The libelant seems to have thought that there was a distinction in the kind of service that he performed, as constituting a lien against the tug, and that the service as engineer was superior to that which he rendered in other capacities; but under the circumstances of the case there does not seem to be any just distinction existing in the law as to the service performed; and the fair mode of appropriating the payments which were from time to time made to the libelant would be to the oldest service performed, unless there was an agreement between the parties as to the appropriation, which does not seem to have been the case. Then the balance which was claimed to be due by the libelant, in that view of the case, might be considered as accruing from the service most recently performed.

There can be no doubt but that in July, 1876, a contract of charter was duly made, although not in writing, between the managing owner and the libelant, and that the tug was run under that contract during a portion of the season of 1876; but it is equally certain, there having been no writing on the subject, that it was competent for the parties to treat this contract of charter as having been abandoned, and to replace or rehabilitate the libelant in the position which he occupied prior to the existence of the charter, provided the rights of third parties were not affected by the arrangement made. The evidence clearly shows that this was all done prior to any interest acquired by the defendants in the tug, and so they would have no right to complain of the arrangement, and I cannot doubt but that it was competent for the parties in interest, by mutual consent, to restore themselves to the position which they respectively occupied prior to the contract of charter.

There remains the question whether the claim of the libelant was so far stale as to prevent the lien from operating upon the tug. The libelant has stated the reason why the claim was not put in litigation sooner. It was because, as he alleges, Cox, the owner, had repeatedly promised to pay the claim, and because he had gone into bankruptcy; and the libelant was informed that that fact affected the validity of his claim. The bankrupt scheduled the claim as a personal demand against himself, which it no doubt was, as the owner and captain of the tug; but, clearly, that could not prejudice the right of the libelant to enforce his claim by any proper proceedings. It did not thereby waive his lien, if any existed, and the manner in which the libelant presented his claim to the bankrupt court could hardly be considered of itself a waiver of the lien.

Medynski admits that when he purchased five-sixteenths of the tug, in the spring of 1877, Cox told him that there were some bills against her, although there was enough due outstanding to pay all, but he denies that Cox mentioned that there was any bill due to Carter. There is a good deal of conflict in the evidence upon this subject, but the fair inference is that information sufficient was communicated to Medynski in the spring of 1877, before or at the time of his purchase, and certainly in the summer of that year, to put him upon full and rigid inquiry as to any liens which might exist against the tug. One of the witnesses refers to a conversation which took place between Carter and Medynski in the latter part of April, 1877, where Carter's claim was particularly referred to, and in

which Medynski assured him that he need have no anxiety about the payment of his claim. And Koehler states he told Medynski of Carter's claim before he purchased. But suppose there be a doubt upon this point, then would the fact that no proceedings were instituted by the libellant against the boat during the season of 1877, and not until May 8, 1878, waive or destroy the lien which originally existed? I do not think it would. In March, 1877, Medynski purchased five-sixteenths of the tug; he did not purchase the remaining eleven-sixteenths until April, 1878; and such delay as this has never been considered as depriving a person who had rendered service on board of a vessel of the lien which the maritime law gives him. The decree of the district court will therefore be affirmed.

### THE MORNING STAR.

(Circuit Court, N. D. Illinois. November 16, 1882.)

#### 1. DECREE—APPEAL FROM DISTRICT COURT—PRACTICE—AMENDMENTS.

When an appeal is taken from a decree in admiralty, it suspends the decree of the district court, and the case proceeds *de novo* in the circuit court, and the libellant is the actor having the affirmative, and must make out the allegations of his libel, and the court may allow amendments to the pleadings.

#### 2. SAME—ADDITIONAL TESTIMONY.

Additional testimony may be taken on both sides in the circuit court, and the court may protect the rights of the parties where amendments are allowed.

#### 3. VESSELS—IN CUSTODY OF MARSHAL—PURCHASER.

Where the claimant became the purchaser of a vessel while she was in the custody of the marshal for the very bill of supplies in controversy in this case, furnished at a foreign port on her credit, to render her seaworthy and competent to proceed on her voyage, he is not entitled to the protection sometimes accorded to a purchaser for value and without notice of maritime liens thereon.

In Admiralty. Appeal from the district court.

Mr. Kremer, for libellant.

Mr. Condon, for defendant.

DRUMMOND, C. J. The libel was filed in the district court on the twentieth day of January, 1882, which alleged that in July, 1880, the libellant had furnished to the schooner, while lying at the port of Buffalo, certain supplies, in order to render her seaworthy and competent to proceed on her voyage, these supplies being furnished at the request of the schooner and on her credit, the master not having money or credit to purchase them. The libellant further alleges there was a

balance due for the supplies furnished of \$1,421.44. On February 25, 1882, the claimant, Morris R. Hunt, filed an exception in the district court alleging "that he is the owner of said schooner Morning Star, with her boat, tackle, apparel, and furniture; that he excepts to said libel, and alleges that the said claim stated in said libel is not a lien on said vessel, and that the same is stale, and not enforceable against her in the hands of or owned by claimant, who is a *bona fide* purchaser for value." On a hearing before the district court the exceptions were overruled, and the claimant required to answer the libel, on failure of which the court entered a decree in favor of the libelant for the amount due, from which decree the claimant has taken an appeal to this court, and now moves to amend the exceptions in order to show when he became the purchaser of the schooner, and thereby to raise the question whether or not he is a *bona fide* owner, so as to relieve her from the maritime lien set up in the libel.

The general rule is that when an appeal is taken from a decree in admiralty it suspends the decree of the district court, and the case proceeds *de novo* in the circuit court. The libelant is, as he was in the district court, the actor in the case. He still has the affirmative, and must make out the allegations of his libel; and there can be no doubt that it is competent for the court to allow amendments to the pleadings—either to the libel or to the answer—in order that the case may be properly heard anew in the circuit court. It is also a matter of every-day practice for additional testimony to be taken on both sides in the circuit court, and that testimony may entirely change the case as it stood before the district court. It is also competent for the circuit court to protect the rights of parties where amendments are allowed to the pleadings. In this case the claimant relied upon his exceptions, and no proof was offered, and he has brought the case to this court upon the ruling of the district court, which held that the exceptions were not sufficient. The subject of costs is always in the control of the court, whether a decree be given for the libelant or for the defendant.

There does not seem to be any case cited by counsel which is precisely like this, but I am inclined to think that it is within the principle of some of the cases cited by the counsel of the claimant, and that it is not an unreasonable exercise of the discretion of the court to allow the amendment which is sought to be made in this case. Therefore, I shall permit it to be filed; but I must impose conditions upon the claimant, and hold that, as a condition upon which this amendment is allowed, the costs of the district court shall be

paid. The decree of the district court, as it stands upon the pleadings, I think was right. The claimant seeks by an amendment of the pleadings to present the case in a different aspect to this court, which may, perhaps, show that the decree of the district court should not be permitted to stand; and in order to receive that favor, it seems to me that he should pay the costs of the district court. If, upon proceeding further in this case, he shall succeed in making out his defense, then he would be entitled to the costs in this court. I shall, therefore, allow the amendment. I would suggest to the counsel that he had better make the amendment in accordance with the exact facts in the case, so if he wants to make it a question of law, it will fairly arise upon the exceptions, and render any proof on either side unnecessary.

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(January 30, 1883.)

In accordance with the leave granted by the court, the claimant in this case has filed an amended exception, in which he alleges that he became a *bona fide* owner, for a valuable consideration of said schooner on or about February 25, 1882, and that the demand set forth in the libel is not enforceable in admiralty against said schooner in the hands of and owned by the claimant.

A monition issued on the same day that the libel was filed, and the marshal levied the same on the schooner on that day. On March 3, 1882, the claimant gave the requisite bond, and the schooner was released from custody. It therefore appears by the record in this case that at the time the claimant purchased the schooner she was in the custody of the marshal, held under the bill for supplies furnished in this case, those supplies being furnished in July, 1880; some payments having been made on the same, as shown by the libel, as late as October 15, 1880. The remaining part of the season of navigation of 1880, from October 15th, and the whole of the season of 1881, were permitted to pass without any attempt to enforce the lien; and, as already stated, the libel was not filed in the district court until the twentieth day of January, 1882, and the question is whether from that delay the lien of the libelant was gone. I am of the opinion that it was not.

It is not necessary for the court to decide in this case what would have been the effect of that delay, provided, within the meaning of the law, the claimant had become a *bona fide* purchaser of the schooner; but it seems clear that having made the purchase when



the schooner was *in custodia legis* for the very bill of supplies in controversy in this case, that he could not acquire a title as a *bona fide* purchaser against the libellant. At that time the schooner was in the custody of the marshal to answer for the supplies furnished in this case, and I think the claimant is, therefore, not entitled to the protection which is sometimes accorded to purchasers of vessels made for value, and without notice of maritime liens against them.

A decree will, therefore, be rendered for the libellant.

### THE RED WING.\*

(District Court, E. D. Missouri. December 6, 1882.)

#### 1. LIEN FOR SUPPLIES FURNISHED AT HOME PORT.

A party furnishing a vessel with supplies at its home port on credit is not entitled to an admiralty lien upon the vessel, except where a lien is given by a local statute.

#### 2. ENFORCEMENT OF.

Where a state statute gives a lien for supplies furnished at a home port, a lien for supplies so furnished will be enforced by a court of admiralty, but only when it comes strictly within the terms of the statute.

#### 3. TIME WITHIN WHICH LIEN MUST BE ENFORCED.

Where the state statute prescribes a time within which the lien must be enforced, if at all, the limitation will be recognized by the federal court.

#### 4. WHERE VESSEL IS IN THE CUSTODY OF A STATE COURT.

Where, at the time a libel is filed against a vessel in a court of admiralty, the vessel is in the custody of a state court, the libellant cannot enforce his process by seizure until the custody of the state court ceases.

#### 5. SAME—LIMITATIONS—EFFECT OF CUSTODY OF STATE COURT.

Where a lien for supplies furnished a vessel at its home port was, by the terms of the statute conferring it, only enforceable within nine months after the supplies were furnished, and the vessel to which they were furnished was during the whole of the prescribed period in the custody of a state court, *held*, that the fact of such custody did not enlarge or suspend the operation of the state statute.

In Admiralty.

*Given Campbell*, for libellant.

*James Taussig and George A. Madill*, for claimants.

TREAT, D. J. The libel is for supplies furnished in a home port. Under the state statute a lien existed therefor, to be enforced within nine months. More than nine months passed before the libel was filed. It appears that the defendant vessel was owned by a corpora-

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

tion, whose assets, including the vessel named, had passed into the custody of a receiver appointed by the state court soon after the demand accrued, and that immediately after such custody ceased this suit was instituted, although nine months had elapsed.

Under the decisions in the cases of *The Lottawanna* and *The Edith* this court must hold that supplies in a home port cannot be recognized in admiralty except in strict compliance with the terms of the local statute giving a lien therefor. As early as the case of *The Golden Gate* (1857) this court discussed the main propositions involved, supposing that the United States supreme court would depart from the narrow English rule followed in the case of *The Gen. Smith*. As that court had, in the case of *The Genessee Chief*, overruled the English doctrine as to tide-water, it was thought it would also overrule the equally-narrow English rule as to home supplies. It has, however, adhered to that narrow rule, and at the same time admitted as maritime demands, cognizable in admiralty, those arising in a home port where the local statute gives a lien therefor, and restricting those demands to the positive terms of the local statutes.

The argument in this case pursues the same line of reasoning often enunciated in this court, but which the United States supreme court has repudiated. It has often been stated in this and in the United States circuit court that the admiralty and maritime jurisdiction of the United States courts could not be enlarged or restricted by state enactments, and hence the latter should be disregarded. At the same time it was stated that supplies in the home port, independent of state statutes, were within federal cognizance. This latter ruling was based on grounds fully presented in the dissenting opinion of Justice CLIFFORD in *The Lottawanna Case*, 21 Wall. 558. The United States supreme court, however, has adopted a ruling to which all inferior courts must conform, no matter what difficulties or seeming injustice may follow. The present case furnishes an apt illustration of some of the difficulties. If the demand constituted a maritime lien enforceable in admiralty, independent of local enactments, then no action of a state court could divest the same. If, at the filing of the demand in the United States court, the vessel was in state custody, the libellant could not enforce his process by seizure, but the seizure could be made so soon as the state custody ceased. The rules of law in this respect have been long settled.

The apparent inconsistencies urged are that if the demand were a pure admiralty lien, as if for seamen's wages, it would override state process as to priority; but that as it is a demand with a lien declared

maritime merely through state statutes, the libellant is in a position where, if he pursues his remedy in the state court, it will be wholly inadequate, and if he resorts to the United States court, under the circumstances, interminable delays and expense will occur, or he will be barred by the limitations prescribed. The state statute recognizes as liens many demands which are not maritime, and if the state court enforces these demands, many of them which are not maritime within the ruling of the United States supreme court will be put on an equal footing with the maritime. If, on the other hand, the maritime lien, recognized only by force of the state statute, is pursued in the admiralty court, then the state statutes as to rules of distribution must be overridden. What, then, shall be the rule of action?

As the law has been pronounced by the supreme court concerning supplies in a home port, difficulties like those now presented may frequently occur. An effort to enforce libellant's demand in the state court would give him only a *pro rata* amount with many maritime demands; but his claim presented in the United States court would give him priority in right. Again: The state court, under the corporation act, had taken possession of all the assets of the corporation, including the defendant's vessels, and consequently such assets in the hands of its receiver were subject to existing maritime liens, and also to statutory liens. Which should dominate? Pure admiralty liens would override mortgages and liens merely statutory, but how stand lien demands which exist only by force of state statutes, yet recognized in *The Lottawanna Case* as maritime and enforceable in admiralty? It is impossible to avoid the difficulties presented, in the light of authoritative rulings. The state statutes do or do not affect the jurisdiction of admiralty courts. If they are to be received as operative, where is the dividing line? If operative only as to such liens created as are maritime in their nature, which, but for the state statute, would be discarded, how is it that a United States court acquires jurisdiction through a state statute alone, in admiralty, and then repudiates all that statute contains except what may be considered as maritime, cognizable in admiralty under the United States constitution and laws? The demand is or is not a maritime lien, cognizable in admiralty courts; yet the United States supreme court has held that resort can be had to state laws to eke out or give jurisdiction, which otherwise would not obtain.

Without attempting to solve the many difficulties resulting from the rejection of the true maritime rule as to home supplies, it must suffice to state that the case falls within the doctrines laid down in the

cases of *The Lottawanna* and *The Edith*. This suit was instituted for a maritime lien originally existing by force of the state statutes, which lien ceased at the expiration of the prescribed nine months. The fact that the lien could not have been previously enforced by seizure, in consequence of the custody of the state court, does not enlarge or suspend the operation of the state statute. The lien expired before the suit was brought.

The exceptions are sustained and the libel dismissed, at cost of libellant.

See, generally, *The De Smet*, 10 FED. REP. 483, and note, 489.

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### THE PRIVATEER, her tackle, etc.

(*District Court, S. D. New York. January 18, 1883.*)

#### VESSEL—PERSONAL INJURIES—WHEN NOT LIABLE.

Where a gang of workmen, including the libellant, employed to remove ballast from the ship, removed the ladder in ordinary use for workmen from the ship's side and put it down the hold, and at noon, on going off from the vessel, instead of returning the ladder to its place for their use, went aft and used the poop ladder, placed there temporarily for private use and not fastened, and were warned that it was unsafe, and the ladder fell as the libellant was going down, whereby he sustained severe injuries, *held*, that he had no ground for an action against the vessel for damages for personal injuries.

In Admiralty.

*Jesse Johnson*, for libellant, (*W. R. Beebe*, of counsel.)

*Benedict, Taft & Benedict*, for claimant.

BROWN, D. J. On considering all the evidence, I am of opinion that the libellant had no right to make use of the ladder from which he fell in leaving the ship, if there was any other means of exit. This is shown (1) by the character of the ladder itself, since it obviously was not one for the common and ordinary use of seamen and workmen: it was a heavy ladder, weighing some 200 pounds, made with steps like stairs, of hard wood, polished and finished with beeswax; (2) by the place of the ladder, which was at the poop, near the cabin, where seamen and workmen do not belong, unless they have business there; (3) by the testimony of several masters of vessels showing that a ladder of this kind is designed only for the use of the masters and officers, passengers and visitors, and is not customarily used for seamen or workmen. There is no satisfactory evidence to the

contrary; that of Collins, in my judgment, being insufficient. Moreover, the ladder is shown to have been put in its position by orders of the master for the accommodation of his family, who were expecting to visit the ship, with orders to the mate that its use by others should be forbidden. The witness Perry received these orders from the mate. He was by the ladder when the men went down, and, as he swears, forbade the use of it, and told them it was not fastened and unsafe. This notice is denied by the libellant. That a conversation did occur between him and the libellant regarding the use of the ladder is manifest from the libellant's statement that he said to Perry, "Let me pass; I want to get my dinner." No explanation is given by the libellant of the reason for this remark. All the evidence on the part of the claimant, viz., that in regard to the nature of the ladder, the use it was designed for, the orders restricting its use, the attendance of Perry to prevent its use by the workmen, and his notice to the men, which he testifies he gave, are all harmonious and consistent, and are, in fact, sustained by the libellant's testimony as to what he said to Perry. I am of opinion that McCabe and the rest of the men were notified not to use this ladder, and that they had no right to use it.

There was another ladder, with rounds, which was the ordinary means of going on and off the ship, amidships, near the main hatch, where the men were at work. I have no doubt that the men took this ladder from the side of the ship and put it down the hatch to go to the hold. It was their business to take it up and put it over the side of the ship for their use in going off. There is testimony on the part of the claimants that this ladder was used by the men on going aboard, although the libellant's witnesses testify that they used the other ladder at the poop on going aboard. There is no probability that the ordinary ladder for use amidships was removed before the men came aboard, so as to compel them to go up by the poop ladder, contrary to custom, and contrary to the master's express orders; and in testifying three years after the occurrence the libellant's witnesses might be very easily mistaken in their recollection as to which ladder they had used on going aboard, and it is impossible for me to place much reliance on their testimony in this respect. I think there is little doubt that they went up by the usual ladder amidships, and having taken up this ladder for use in the hold they were bound to replace it for going off at noon and coming on again.

But even if the men had a right to make use of the poop ladder, and no notice was given them not to use it, I do not see how the ves-

sel can be held in fault. The ladder by its construction was one that could not be safely kept lashed to the rail, because liable thereby to be broken through the rise and fall of the tide; and it was not customary to keep such a ladder lashed. There was no defect about the ladder itself. It fell in consequence of slipping at the bottom, upon the slippery ground, on a sleety winter's day. If it had been lashed to the rail at the top, that would doubtless have prevented its slipping; but the character of the day, the slippery ground on which the ladder rested, and the want of any lashing at the top, were as well known to the workmen, or as visible to them, as to the man on board the ship. The crew had already left; the workmen discharging the ballast were employed upon an independent contract; and I do not perceive on what ground the vessel was bound to keep a man in attendance to fasten and unfasten this particular ladder for the men's accommodation, even if there had been no objection to their using it. It could have been as well secured by being held at the bottom by their companions while the men were descending, as by fastening at the top. I do not perceive, therefore, any obligation of the ship to the men in regard to it.

It is urged that, had notice been given, as claimed, the men would not have run the risk of going down upon it. But every day's experience proves that men will often foolishly risk their lives to save a few minutes' time, or to avoid a little additional trouble. McCabe had seen four men go down safely immediately before him, and evidently, as I think, insisted on following them. He went, therefore, at his own risk; and, much as his consequent injuries and suffering and loss are to be deplored, I must hold the ship not responsible, and dismiss the libel, with costs.

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THE C. C. TROWBRIDGE.

(District Court, N. D. Illinois. January 29, 1883.)

JURISDICTION—DOES NOT ATTACH OVER EQUITABLE CLAIMS.

Where the contract set out in the libel is merely a loan for money, for the payment of which the vessel was conveyed as security, the admiralty has no jurisdiction; the remedy is in equity.

In Admiralty.

Wm. H. Condon, for libellant.

Schuyler & Kremer, for respondents.

BLODGETT, D. J. This is a libel for the possession of the schooner C. C. Trowbridge, the substantial allegations being that on February, 28, 1881, the libelant was sole owner and in possession of said schooner; that on said day he borrowed of respondents, Goodman & Hinde, the sum of \$4,000, and as security for said loan executed and delivered to them a bill of sale of the schooner, absolute on its face, conveying to them the whole of said schooner; that said bill of sale was executed on the understanding and condition that Goodman & Hinde should hold the schooner until such time as the amount so loaned should be repaid to them out of her earnings; that since the execution of said bill of sale libelant has acted as master of the schooner, and that her net earnings for the seasons of 1881 and 1882 have been received by Goodman & Hinde, and are more than enough to pay said loan and interest thereon; that on the twenty-seventh day of November last libelant was discharged from his position as master of said vessel, and that said Goodman & Hinde then for the first time denied that they held the title to said schooner subject to the conditions above stated, or any conditions, and informed libelant of their purpose to take the vessel out of this district for the purpose of having expensive repairs made upon her, which repairs libelant charges were wholly unnecessary; wherefore he prays that possession of the schooner be delivered to him; that the court decree the transfer and sale made by libelant to respondent to be only a mortgage; and that an accounting be had of the earnings of the schooner received by respondents, and that they be decreed to pay libelant all such earnings over and above the amount of such indebtedness.

Exceptions were filed to this libel, on the ground that this court has no jurisdiction, and on reference the commissioner (Proudfoot) to whom the libel and exceptions were referred has reported that the exceptions were well taken, and recommended that the libel be dismissed.

To this report libelant has excepted.

In his report upon the exceptions to the libel the commissioner has carefully collected and cited the authorities bearing upon the jurisdiction of courts of admiralty over controversies of this character.

In passing upon these exceptions to the commissioner's report, I only deem it necessary to say briefly that, by the showing of libelant, the legal title to the schooner in question was vested in respondents by the bill of sale, and libelant only retained the equitable right to have this legal title reconveyed to him when the indebtedness for which respondents held such title as security was fully paid. He

also charges that such indebtedness has been fully paid out of the earnings of the schooner; but the legal title still remains in respondents, with the equitable right, as the libellant now insists, to have the possession delivered to him and the legal title reconveyed to him.

This is not a maritime contract,—that is, a contract to be performed upon the high seas,—but it is merely a loan of money for the payment of which the schooner was conveyed as security.

It is settled that admiralty has no jurisdiction to foreclose a mortgage on a vessel by decreeing a sale, or by decreeing the ship to be the property of the mortgagees, and directing the possession to be delivered to them. The mere mortgage of a ship, other than that of hypothecated bottomry, is not a maritime contract, and the remedy is in equity. *Bogert v. The John Jay*, 17 How. 399. So a lien specifically reserved on a vessel by a contract with the builder, which, in legal effect, amounts only to a mortgage, cannot be enforced in a court of admiralty. *People's Ferry Co. v. Beers*, 20 How. 393. A court of admiralty has not jurisdiction of a proceeding *in rem* or *in personam* by one having a mere equitable title to a share of a vessel, but not in position to obtain possession and have specific performance. 3 Mason, 16; *Kynoch v. The Ives*, Newb. 205; *Davis v. Child*, Davies, 71. Nor will a court of admiralty take jurisdiction of a libel *in personam* which seeks an accounting for the proceeds of a voyage. *Dur-yea v. Elkins*, Abb. Adm. 529; *The William G. Rice*, 3 Ware, 134; *The Larch*, Id. 28. And admiralty takes jurisdiction of petitory suits for possession of vessels only in cases where the legal titles are involved. *Kellam v. Emerson*, 2 Curt. C. C. 79.

The transaction set out in the libel showing that libellant only claims an equitable title to this vessel, there can be no doubt, in the light of the authorities above cited, and they are only a few of many to the same purport, that this court has no jurisdiction to try the question involved in this controversy.

We cannot decree an accounting between these parties, and direct and enforce a reconveyance of the schooner to libellant, if, upon such accounting, we find that the indebtedness has been fully paid, but must leave the adjustment of such controversies to the more ample and flexible powers of a court of equity.

The exceptions to the commissioner's report are overruled, the report confirmed, and cause dismissed.



## GREEN v. SWIFT and others.

(District Court, D. Massachusetts. January 6, 1882.)

## SEAMAN—WHALING VOYAGE—DISCHARGE AND SETTLEMENT WITH.

A seaman in the whaling service, when discharged during the voyage at his own request, is not disqualified from making a settlement of his wages, upon the payment of a sum fairly and intelligently agreed upon, when the amount to become due to him is uncertain and depends upon the future success of the voyage.

In Admiralty.

*W. C. Parker, Jr.*, for libelant.

*H. W. Swift*, for respondents.

NELSON, D. J. The libelant proceeds for his lay, as, successively, the third, second, and first mate of the bark *Pacific*, which sailed from New Bedford in December, 1876, on a five years' whaling voyage. In April, 1879, he was discharged at his own request, at Honolulu, after being out two years and four months, and received from the master an order on the owners in New Bedford to pay him, at the termination of the voyage, the amount which should then be due him. Returning to New Bedford, he made a settlement with the owners on the tenth of May, 1879. Their account against him for advances and articles furnished him on board the ship was \$1,016.65. They paid him in addition to this the sum of \$300, and took from him a release, under seal, discharging them from all further claims on account of the voyage. The shipping articles contained the usual clause, providing that if any officer or seaman shall be prevented by sickness or death from performing the entire voyage, he shall be entitled to such part of the whole amount of his stipulated share as the time of his service on board shall be of the whole term of the voyage; and it is the uniform usage to settle with seamen who are discharged by mutual consent during the voyage, in the same manner as is expressed in this clause, unless there is some express written agreement to the contrary. The voyage terminated in December, 1881, and proved to be unusually successful; and it now appears that his wages at the end of the voyage amounted to a much larger sum than he received. He now claims that the settlement was an unfair one, and asks to have it opened. The libelant, being absent on a whaling voyage, did not testify at the hearing. The only evidence in the case bearing upon the issue comes from *Mr. Aiken*, a witness called by the respondents, who was a clerk in their employment and acted for them

in the transaction. From his statement it appears that the settlement was made at the request of the libelant. After some negotiation he offered to take \$300 and clear the ship and owners. This offer was accepted by the owners, and upon being paid that sum he signed the release. If any deception was practiced upon him, or any fact affecting the voyage was concealed from him or misrepresented, he ought not to be held to his settlement. But I am satisfied that this was not the case. The accounts of the ship were explained to him, and he was put in possession of every fact concerning the voyage which was known to the owners. The settlement was made voluntarily at his own request and for his benefit, and no undue advantage was taken of his necessities. A seaman in the whaling service, when discharged during the voyage at his own request, is not disqualified from making a settlement of his wages upon the payment of a sum fairly and intelligently agreed upon, when the amount to become due him is uncertain and depends upon the future success of the voyage. This voyage might have terminated unfortunately, and the owners have been the losers. The libelant ought not to be permitted to go back of his bargain merely because the voyage was successful. I see no reason to disturb the settlement.

Libel dismissed.

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### ONE HUNDRED TONS OF COAL.

(*Circuit Court, N. D. Illinois.* January 6, 1883.)

#### SHIPPING—DEMURRAGE.

Where the shipper of coal on a schooner expressed some doubts as to the depth of water at a certain dock at the port of delivery being sufficient to admit of the delivery of the coal at that dock on account of the size of the schooner, but the captain took the chances of there being sufficient depth of water there, and on arrival it was discovered that delivery could not be made at such dock, the captain can lay no claim for demurrage for delay caused by the necessity to proceed to another dock, or for expenses in consequence of the delay.

In Admiralty. Appeal from the district court.

Mr. Condon, for libelant.

Mr. Kremer, for respondent.

DRUMMOND, C. J. In September, 1880, Henry P. Card, of Cleveland, Ohio, chartered the schooner *Ida Keith*, of which the libelant was owner and captain, to take a cargo of coal from Cleveland to Chicago; and the libel was filed by the captain for the reason, as al-

leged, that necessary dispatch was not given to the schooner after her arrival in Chicago. The district court dismissed the libel, and I think that decree was right.

At the time the contract was made in Cleveland for the charter of the vessel, which seems to have been entirely verbal, Card suggested to the captain that he had some fears lest the schooner was too large to deliver the cargo of coal at the dock of P. O'Connor, near Rush street bridge, in Chicago, on account of drawing too much water, to which the captain replied that the water was a foot deeper there than it had been in the spring, and he would take the chances of there being sufficient depth of water there if the cargo of coal were delivered to him.

This fact, upon which the case must substantially turn, seems to be established by a clear preponderance of evidence. The coal had been sold to P. O'Connor, to be delivered at his dock. The shipper seems to have been doubtful as to whether the schooner could deliver the coal there on account of her size, declaring that he would prefer to ship on a smaller vessel. That doubt was removed by the statement of the captain himself, who professed to be familiar with the depth of the water, and took the chances of its being sufficient to enable him to land the cargo there on his arrival in Chicago with the schooner. It seems that she drew too much water, as he himself admits, for him to land the cargo at O'Connor's dock, the result of which was that it was necessary for the shipper, Card, to direct his agent to sell the coal to some other person, and the coal was accordingly sold to J. D. Stone, at a loss to Card, as he says, of more than \$200; and this involved the necessity of the schooner being towed up the river to Stone's wharf, where there was considerable delay in consequence of the delivery not being made by three hatches instead of two, as was the fact. It followed, from this condition of affairs, that there were more or less delay and expense in consequence of the coal not having been delivered at O'Connor's wharf; but it seems to me that this grew out of the conduct and statements of the captain himself, and he can lay no claim to demurrage, or expenses in consequence of the delay and delivery of the coal at another wharf.

The decree of the district court will, therefore, be affirmed.

## THE HATTIE LOW.

(District Court, S. D. New York. December 21, 1889.)

## 1. SEAMAN'S WAGES—MINOR SON OF MASTER.

A father is entitled to the earnings of a minor child who lives with him, and is under his governance, protection, and support.

## 2. SAME—LIEN DOES NOT ATTACH.

Where a father agreed to run a vessel on shares, and to pay all the expenses of running her, and his minor son, being a member of his household and living on board as a member of the father's family, acted as mate, *held*, no lien against the vessel could, under such circumstances, be acquired by either the father or son, and the libel, therefore, was dismissed.

In Admiralty.

*Beebe, Wilcox & Hobbs*, for libelant.

*Samuel B. Caldwell*, for claimant.

BROWN, D. J. The libelant is shown by the evidence to have been a minor about 18 years of age, and during all the time he rendered the services as mate, for which this libel was filed, to have been a member of his father's household, who was master of the vessel and lived with all his family on board, and as such member was under his father's governance, protection, and support. The libelant was never employed by the owners, but by the father only. Whatever his father paid him in money, then or previously, under such circumstances, were voluntary payments; the father was legally entitled to his earnings, (*Plummer v. Webb*, 4 Mason, 382; *Luscom v. Osgood*, 1 Spr. 82; *Cutting v. Seabury*, Id. 522; *The David Faust*, 1 Ben. 183; 2 Pars. Shipp. & Adm. 371,) and no suit at law could have been maintained by the libelant against his father therefor. The father being, therefore, entitled to these services, and under his agreement with the owners being bound to pay all expenses in running the vessel on shares, no lien could arise against the vessel for the son's services so rendered. Action like that of the father in this case, in endeavoring to assist in fastening a lien upon the vessel under such circumstances, has been declared to be "committing a virtual fraud upon the owners." *The Columbus*, 5 Sawy. 487, 492; and see *The William Cook*, 12 FED. REP. 919.

For these reasons, in addition to those stated by the commissioner, the exceptions are overruled, and judgment ordered for the claimant.

## NICKERSON, Trustee, v. MEACHAM and others.

(Circuit Court, D. Nebraska. January, 1883.)

## 1. EQUITY—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—CONVEYANCE OF MORTGAGED PREMISES.

The holder of a mortgage surrendered the same upon the receipt of a quitclaim deed of the land from the mortgagor. The mortgagor, without knowledge of the mortgagee, had previously deeded the same land to his daughter, who, prior to the surrender of the mortgage by the mortgagee, and the conveyance of the mortgaged land by her father to the mortgagee, deeded the same to a third party, in consideration of certain promissory notes of doubtful value. *Held*, that if the conveyance of the daughter to the third party was without consideration, it should be set aside, and that the mortgage, which had been canceled in ignorance of the fact that the mortgagor had parted with the title, should be enforced against the land. It was the duty of the holder of the mortgage to examine the record for conveyances by the mortgagor before taking a quitclaim deed, and as against a *bona fide* purchaser for value he would be without remedy; but if the party claiming to be a *bona fide* purchaser for value is proven not to be such, he has no equities, and there is nothing to prevent a court of equity from disposing of this case upon the equities as they exist between the mortgagor and mortgagee.

## 2. SAME—BONA FIDE PURCHASER—PAYMENT BEFORE NOTICE OF EQUITIES—PROOF.

A party relying upon the defense that he is a *bona fide* purchaser, entitled to hold notwithstanding a prior equity, must establish his defense by proof. It is an affirmative defense. The statement of a consideration in the deed is not sufficient, but actual payment before notice must be shown.

## 3. SAME—PRESUMPTION AS TO VALUE OF PROMISSORY NOTES.

As a general rule, the law will presume that a promissory note, even if past due, is worth its face in money; but this is only a presumption which arises in the absence of direct proof as to value, and may be overcome by comparatively slight proof in contradiction, especially when the paper is old, dishonored, or outlawed.

**In Equity.** On exceptions to master's report.

The principal matter in controversy in this case is as to the validity of a conveyance of certain lands from respondent Mary Meacham to respondent H. H. Blodgett, of date February 7, 1880. The title to the land was, prior to February 8, 1877, in respondents Stephen A. Meacham and Nancy, his wife, who on that day executed a mortgage thereon to A. Otis Evans, to secure the payment of \$2,700, with interest and attorney's fees. The purpose of this suit is to foreclose said mortgage; and in order to make the foreclosure effectual, complainant prays the cancellation of the conveyance above referred to, and that the satisfaction of said mortgage hereinafter mentioned may be set aside.

On the twenty-fifth day of September, 1877, said Stephen A. Meacham, then the owner of said land, his wife not joining, conveyed the premises to his daughter, the respondent Mary Meacham, excepting from the covenant of warranty the mortgage above named. On the twelfth of October, 1878, the said A. Otis Evans, through his agent, having no knowledge of the conveyance from Stephen A. Meacham to Mary Meacham, took from the said Stephen A. and Nancy, his wife, a quitclaim deed in the name of B. L. Harding for the land in question, and as the sole consideration therefor delivered up as satisfied the aforesaid notes and mortgage for \$2,700.

On the seventh of February, 1880, the respondent H. H. Blodgett received a conveyance of the land in controversy from said Mary Meacham, the consideration in the deed being expressed as \$4,200. This last transaction, which is the subject of the present controversy, was in this wise: Blodgett gave to said Mary Meacham promissory notes against various parties, amounting to \$4,200, as the consideration for the whole of the land, and immediately agreed with her to reconvey to her one-half of the land, in consideration that she should allow him to take back one-half of the notes to be selected by him. Accordingly, after receiving the conveyance, Blodgett reconveyed to Mary Meacham the undivided half of the land, and selected and took back one-half of the notes. It is charged that this transaction between Blodgett and Mary Meacham was fraudulent, and also that it was without consideration, the notes left in her hands after returning the selected one-half to him, having been, as is alleged, entirely worthless.

The case has been twice before the master. In his first report he found, as a fact, that the notes given by Blodgett to Mary Meacham, as a consideration for said land, were old notes, uncollectible and worthless, and nearly all, if not quite all, past due; and that not a dollar has ever been collected thereon. The case was recommitted to the master to further investigate the question of the value of said notes, with leave to parties to produce further proof. After taking a large amount of additional evidence the master has filed a second report, in which he finds as facts (1) that the consideration for the conveyance in controversy was grossly inadequate; (2) that he cannot find that any of the notes have been collected or paid.

When the case came up for hearing upon exceptions to this latter report, after the oral argument, the court directed counsel to file briefs upon the whole case, but to give special attention to the question: what, under the circumstances of this case, is the presumption as

to the value of the notes turned over by Blodgett to Mary Meacham in consideration for the conveyance, in the absence of any direct proof upon the subject? Elaborate briefs have accordingly been filed.

*J. L. Webster*, for complainant.

*Walter J. Lamb, G. M. Lambertson, J. E. Philpot, J. C. Crooker, and H. H. Blodgett, pro se*, for respondents.

MCCRARY, C. J. If the conveyance from Mary Meacham to H. H. Blodgett was without consideration, it should be declared void and set aside, and the mortgage for \$2,700 should be enforced against the land, since it was undoubtedly canceled in ignorance of the fact that the mortgagor had parted with the legal title and was no longer able to make a valid conveyance. It is true, as respondents' counsel have said, that it was the duty of the holder of the mortgage to examine the record for conveyances by the mortgagor before taking a quitclaim deed from him and canceling the mortgage; and it follows that, as against a *bona fide* purchaser of the land for value after the cancellation of the mortgage, he is without remedy. But if Blodgett is not such a purchaser he has no equities, and there is nothing to hinder a court of equity from disposing of the case upon the equities as they exist between mortgagor and mortgagee. As between them, complainant is entitled to relief, as the cancellation of the mortgage was the result of a mistake on the part of the mortgagee, and of a palpable fraud on the part of the mortgagor, who of course knew that he had conveyed the land to his daughter, and that he had no power to convey it a second time. Our inquiry must therefore be confined to the question, was Blodgett a *bona fide* purchaser for value? The proof leaves this question in doubt. All that clearly appears is that Blodgett turned over to Mary Meacham a number of promissory notes, all of which were past due, and some of which were certainly worthless. Whether any of the notes turned over by him were of any value, is a question which cannot be clearly settled upon the evidence in the case; and it must, therefore, depend upon the question whether the law raises a presumption, in the absence of proof, that the notes were of value. The respondent Blodgett rests his defense upon the claim that he is a *bona fide* purchaser of the land in question without notice of the prior equities existing in favor of the holder of the mortgage. A party relying on the defense that he is a *bona fide* purchaser, entitled to hold notwithstanding a prior equity, must establish his defense by proof. It is an affirmative defense. The statement of a consideration in the deed is not sufficient, but actual payment before notice must be shown. The facts giving the right of protection must be al-

leged and proved. Abb. Tr. Ev. p. 715, § 38, and cases cited. The same rule is laid down in the case of *Boon v. Chiles*, 10 Pet. 177.

The burden being upon the respondent, Blodgett, to make out his defense by showing affirmatively that he is a *bona fide* purchaser for value, he claims to have discharged it by showing that he turned over the notes in question in payment for the land, and without showing affirmatively that the notes were of value. As a general rule, the law will presume that a promissory note, even if past due, is worth its face in money; but this is only a presumption which arises in the absence of direct proof to establish the value of the paper, or of circumstances sufficient in themselves to rebut the presumption. Indeed, this presumption is much stronger where the paper is not yet due, than it is where it is overdue and dishonored; but it prevails in either case.

The question here is whether the circumstances are such as to rebut this presumption, and to throw upon respondent Blodgett the burden showing that the notes were of value, or, in other words, that he paid value for the land.

There are several circumstances tending very strongly to throw suspicion upon the entire transaction, and, when they are all considered together, they are of such a character as ought, in my judgment, to overcome the presumption that the notes, or any of them, were of value. These circumstances may briefly be stated as follows:

1. The purchase was made by Blodgett without any investigation as to the title to the land. It is fair to presume that if he had been paying what he regarded as a fair price, purchasing in good faith, he would have looked into the record to ascertain the condition of the title.

2. Equally suspicious is the fact that Mary Meacham accepted the notes, all past due and some barred by the statute of limitations, without inquiry as to the solvency of their makers, and without investigation of the question whether they were good or not. It must be considered very remarkable indeed that a person of mature years and ordinary intelligence would, in good faith, sell and transfer a large body of valuable land for such a consideration, and without knowing or inquiring whether she was receiving anything of value or not.

3. Still more remarkable and suspicious is the circumstance that the parties agreed that after the delivery of all the notes by Blodgett to Mary Meacham, and after a conveyance from the latter to the former of all the land, and as a part of the same transaction, Blod-



gett should reconvey to Mary Meacham one-half of the land, and should select and take back from her one-half of the notes. It is impossible to understand why all this was done, if it was not for the very purpose of giving him the opportunity to take back all the notes that were of any substantial value, and leave in her hand only those that were practically worthless.

4. The court cannot overlook the fact, which appears in the testimony of Blodgett, that he is unable to give the name of a single one of the makers of the notes who is or has been, since the transaction in question, solvent in the sense of having property subject to execution. When the case was referred to the master, the court supposed that a list of the notes transferred could be readily obtained; that the names and places of residence of their makers could be furnished, either by Blodgett or Mary Meacham; and that thereby the complainant would be furnished with information upon which to prosecute an investigation as to the value of the notes. But it seems that after a long investigation, and the taking of testimony covering hundreds of pages, there is even yet some doubt as to who the makers of the notes were, and as to where they are to be found. Add to this the fact that no effort whatever has been made to collect any of the notes, and that not a dollar has been paid upon any one of them during a period of now nearly three years, and it must be admitted that all the circumstances, taken together, are such as to cast great doubt upon the question of the *bona fides* of the transaction, and of the value of these securities.

At the hearing on exception to the master's second report, the court was of the opinion that the case must turn upon the question, whether these facts and circumstances were sufficient to overcome the presumption that the promissory notes were worth their face in money. That such is the general presumption, in the absence of suspicious circumstances and in the absence of proof, seems to be admitted; but it is a presumption which may be overcome by comparatively slight proof, especially in a case where the paper is old, dishonored, and some of it barred by limitation. The law raises the presumption of value only in cases where there is no evidence upon which to found a contrary presumption. If the facts are such as to create a strong doubt of the integrity of the transaction and as to the value of the paper, the burden of showing that the paper was of value will be thrown upon the party asserting that fact. This rule is especially applicable to the present case, where the facts are, or ought to be, known to the respondent Blodgett, and there the com-

plainant, after diligent effort, seems to have been unable to ascertain them.

It is certainly not too much to say upon this record, and the evidence before the court, that the evidence on the part of Blodgett in respect to the payment of the consideration stated in the deed is unsatisfactory, and that such proof was vital in order to uphold the deed, surrounded as it is in other respects with suspicion. This being so, it must be held that the burden of showing that the paper was of value, and that Blodgett was a *bona fide* purchaser, rests upon him. Such, in substance, is the doctrine announced by the supreme court of the United States in two cases at least. *Clements v. Moore*, 6 Wall. 299; *Clifton v. Sheldon*, 23 How. 481.

The result is that there must be decree for complainant in accordance with the prayer of his bill, and it is so ordered.

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### TICE v. SCHOOL-DISTRICT No. 18, ADAMS COUNTY.

(Circuit Court, D. Nebraska. 1883.)

#### BILL TO VACATE JUDGMENT—LIMITATION.

A bill in chancery brought to vacate a judgment obtained in a court of law, and to order a new trial, takes the place of the ordinary petition for a new trial, provided for by the Code of Civil Procedure of this state, and must be brought within one year from the rendition of the judgment sought to be vacated.

In Equity.

*Harwood & Ames*, for plaintiff.

*O. B. Hewett*, for defendant.

DUNDY, D. J. The complainant in this case filed his bill on the sixth day of February, 1882. The object of the suit and the prayer of the bill is to vacate a judgment heretofore rendered in this court, on the ground of newly-discovered evidence, so that the cause may be tried again upon its merits. An inspection of the record shows that on the twentieth day of December, 1879, this plaintiff commenced an action at law against this defendant in this court for the purpose of recovering on certain bonds claimed to have been issued by the defendant to aid in building a school-house for the benefit of the district. The execution of the bonds and all liability thereon was denied by the district. A jury was duly waived, and a trial was thereupon had upon the merits of the controversy. In the trial the issues were determined in favor of the defendant, and the suit was

then dismissed at the costs of this complainant. This trial was had and the judgment rendered on the ——— day of November, 1880. In that trial the members of the school board were all witnesses, and, it may be proper to say, were the principal witnesses. The plaintiff relied upon their testimony, in a great measure, to sustain his cause of action. These witnesses were the school board at the time the bonds bear date, and are the same persons whose names appear on the bonds as members of the school board, and who, as the plaintiff claims, issued the bonds in behalf of the school-district. This complainant now claims to have been taken by surprise to see how little, how *very* little, the said school board knew of the circumstances connected with the issuing of the bonds then in suit. Viewed in the light of subsequent developments, this *surprise* seems to be well founded, and if timely movement had been made in the right direction, the complainant would have been entitled to the relief sought in this action.

The view that I take of this proceeding makes it unnecessary to discuss the character of the new testimony which the complainant claims to have discovered since the first trial, and which he was unable to produce thereat. If what is claimed by complainant in that regard be true, then, certainly, the newly-discovered testimony would have been very material for the complainant when his cause was tried on its merits.

The Code of Civil Procedure of this state has abolished the distinction between actions at law and actions in chancery. But it is fair to presume, and I, therefore, assume, that under it all individual wrongs can be redressed, and all rights maintained, providing, as it does, a complete remedy for all sorts of grievances, whether real or imaginary. Where a cause has been tried upon its merits, and a judgment has been rendered, the judgment so rendered may be reviewed or modified or vacated, and a new trial had, under certain circumstances, and on such terms as may seem to be just. Where errors are committed during the progress of a trial the injured party has full opportunity to have the errors complained of corrected in the court where the errors may be committed. If judgment goes against a party who may feel aggrieved, and he afterwards discovers new, important, and material testimony that he knew not of, and could not discover by using due diligence in time to produce such testimony on the first trial, he may then file a petition for a new trial; but this must be done within one year from the rendition of the judgment sought to be vacated by filing such petition. The complainant, in this

case, has resorted to the familiar practice of filing his bill in equity to vacate the judgment complained of, instead of relying on the Code practice in that behalf. The right to do so must be upheld. In analogy there is but slight difference in the two modes of proceeding, and, after much thought and a careful consideration of the whole subject, I am unable to discover any good and sufficient reason why either mode of proceeding cannot be maintained. I must hold, then, that the filing of the bill, in this and similar cases, simply takes the place of the petition for a new trial provided for by the said Code of Civil Procedure, and must be governed, at least to some extent, by that Code. It seems to be the recent policy of the laws of the United States to conform the proceedings in the federal courts to the practice prevailing in the state courts. There is much good reason in this. After all, the laws of the state are administered in the federal about the same as they are in the state courts, and there is no apparent reason why there should be any difference in results to be attained in resorting to either. The same *rights* are recognized in both. The same limitations and restrictions are recognized and enforced in both. And the only difference to be observed in enforcing, upholding, or maintaining either, is in the *manner* of doing it. That is the application of the remedy provided to accomplish the same results.

Applying this principle to the present case will require the dismissal of suit, though the bill is in many respects a meritorious one. Had it been filed in time, I doubt not the judgment complained of would have been overturned for reasons stated in the bill. But statutes limiting the time within which new trials may be granted, must be looked on with great favor, and their beneficial results must not be denied to those for whose benefit they were enacted. This suit was not commenced until 14 or 15 months after the rendition of the judgment sought to be vacated. As the complainant seeks to have the judgment complained of annulled on the ground of newly-discovered evidence, which might have lead to a different result had the same been produced on the trial, it is my deliberate judgment that his application comes too late; and that, to entitle him to the relief sought in this action, it was necessary for him to file his bill to vacate the judgment complained of within one year from the date of entering the same.

The bill must, therefore, be dismissed; and it is so ordered.

## STATE NAT. BANK OF LINCOLN, NEBRASKA, v. YOUNG and others.

(Circuit Court, D. Nebraska. 1883.)

## 1. LETTER OF CREDIT—WHAT IS NOT.

A letter such as the one following, written by the defendants to the plaintiff, does not constitute a letter of credit:

“CHICAGO, 7-23-1880.

“*State National Bank, Lincoln, Nebraska*—GENTLEMEN: Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us, and we expect to take care of them and pay drafts as heretofore.

“Respectfully,

WILLIAM YOUNG & Co.”

## 2. CONTRACT—AGREEMENT TO ACCEPT DRAFT.

Nor does the same amount to an agreement to accept any drafts which Dawson & Young, or either of them, might draw on William Young & Co., the defendants. To constitute a valid and binding promise to accept the draft of another, the draft must be described in terms not to be mistaken.

## 3. SAME—DEPARTURE FROM TERMS.

Any departure from the terms of an agreement to accept the bill or draft of another, will not bind the party sought to be charged as acceptor.

Demurrer to Petition.

*Mason & Whedon*, for plaintiff.

*Bisbee, Ahrens & Hawley* and *Field & Holmes*, for defendants.

DUNDY, D. J. It is stated in the petition that Dawson & Young were largely dealing in and shipping live-stock to Chicago; that generally they consigned the same to William Young & Co., the defendants, at Chicago, who were then doing business as commission merchants; that Dawson & Young were in the habit of drawing their drafts on Young & Co. for the stock shipped, and that the same were cashed by the plaintiff at the request of Dawson & Young, and that the same, with one exception, were paid by the defendants; the payment of one was refused, and that the same was afterwards paid by Dawson; that subsequently Dawson went to Chicago and saw the defendants, and arranged with them for future acceptances, and, pursuant to the arrangement then made, the defendants wrote to the plaintiff a letter, of which the following is a copy:

“CHICAGO, 7-23-1880.

“*State National Bank, Lincoln, Nebraska*—GENTLEMEN: Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us, and we expect to take care of them and pay drafts as heretofore.

“Respectfully,

WILLIAM YOUNG & Co.”

That the said letter was placed in the hands of the officers of the banks; that after the letter had been so received by the plaintiff, Dawson, on the thirty-first of July, 1880, drew two drafts on the defendants, each for the sum of \$2,000, and on the third of August Dawson drew another draft for the sum of \$1,000, all of which were payable at sight; that the said drafts were cashed by the plaintiff, and that the same went to protest and were never accepted or paid by the defendants.

To this the defendants interpose a general demurrer.

If the letter in question cannot be regarded as an agreement to accept the bills or drafts thereafter to be drawn by Dawson & Young, nor as a letter of credit, then there is no good cause of action stated in the petition. It lacks the usual formalities, and the indispensable requisites of an ordinary letter of credit, so that it is altogether unnecessary to consider it in that connection. The plaintiff treats the letter as an agreement to accept the bills to be drawn by Dawson & Young, and as such we will consider it, because there is nothing stated in the petition, independent of the letter, that would in any way tend to fix any liability on the defendants.

Questions of this sort were quite frequently discussed in the several courts of this Union down to the year 1817, when a decision of the first importance and by the highest authority was finally made.

The English cases bearing upon the subject in hand were fully considered by the court, and, though perhaps not uniform, the principle settled thereby was adopted by our own court, to which it has ever since adhered. The rule deduced from those cases, and which was stated and applied in the first of the leading cases decided in this country, is—

"That a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." *Coolidge v. Payson*, 2 Wheat. 66.

The rule here enunciated has been repeatedly recognized and followed by the supreme court, and its soundness is now believed to be unquestioned. *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 111.

This being the rule, it follows that a letter, to bind the writer in such cases, must be written within a reasonable time before or after the date of the bill to be accepted. The letter must describe the bill in

*terms not to be mistaken.* The letter must contain a *promise to accept such a bill.* The letter must be shown, or its contents made known to, the party for whom it was intended. And the party for whom the letter was intended must have taken the bill or advanced his money on the CREDIT OF THE LETTER, and not otherwise. We must apply this rule to the letter described in the plaintiff's petition, and determine the character and value and efficacy of the letter by that standard.

The letter bears date the twenty-third of July, 1880, and was placed in the hands of the officers of the plaintiff bank soon afterwards, and before the bank cashed any of the drafts. The drafts were drawn on the thirty-first of July and the third of August, respectively. That would seem to be *within a reasonable time* after the receipt of the letter by the bank, and it is not made to appear how any injury could result to the defendants by mere lapse of time between the date of the letter and the cashing of the drafts. But this is not where the real difficulty is to be found. It is stated that "Mr. Dawson, of Dawson & Young, has been to see us, and has explained their business to our satisfaction, and we wish them to continue with us." So far there is nothing about the letter of a dubious or uncertain character, or that could deceive or mislead any one. But it is further stated, "and we expect to take care of them and pay drafts as heretofore." Just how they were to be taken care of does not appear by the letter, nor by averment in the petition. The letter states that they expect to pay drafts as *heretofore*. But *how* did they treat them "*heretofore*?" As stated in the petition, by paying part, and by refusing to accept or pay the other part. If, then, the letter had contained an unequivocal *promise* to pay "drafts as heretofore," would a prudent man be likely to rely on such a promise, knowing at the time that a part only of such drafts had been paid, and that at least one theretofore had been repudiated by the drawee. Would he be likely to part with his money on the faith of such a letter? Ordinary prudence, it seems to me, would stop short of making advances under such circumstances. But the great trouble and inherent difficulty about this letter is, it contains no *agreement* or *promise* to pay or accept the drafts of Dawson & Young. It is simply stated: "We expect to \* \* \* pay drafts as heretofore." That is not enough. There is no *promise* to pay *any* drafts "*as heretofore*." There is no draft or drafts described in "*terms not to be mistaken*." In the absence of such *description* and a promise to pay, no liability attaches. To say, "*We expect to pay drafts as heretofore*," is not equivalent to saying, "*We agree to pay drafts as heretofore*." To hold other-

wise would be doing violence to language and principle alike. There may have been many and good reasons for expecting to pay the drafts, while in reality the apparent reasons were unreal and illusory. However this may be, I am of opinion that the defendants did not *promise* to accept or pay the drafts described in the petition, and that they incurred no liability by writing the said letter; and that they reserved to themselves the right to refuse payment or acceptance of all the drafts described in plaintiff's petition.

There is another point which might be fatal to the plaintiff's right to recover, even if we could regard the letter as an absolute promise to pay the drafts of Dawson & Young. The fair construction to be placed on the letter would lead us to conclude that the writer had in his mind the drafts of Dawson & Young, which they expected to "pay as heretofore." The drafts actually repudiated by the defendants were not drawn on them by Dawson & Young, but by Dawson alone. So if the letter had fully described the drafts to be drawn by Dawson & Young, and the defendants had promised to accept and pay them when so drawn, still I think even then they would be under no sort of legal obligation to accept and pay the drafts drawn by Dawson alone. It seems unnecessary to elaborate, as the correctness of this proposition, it is submitted, cannot be controverted.

The demurrer is sustained.

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DOTY and others v. LAWSON, Jr., and others, Adm'rs, etc.

(Circuit Court, E. D. Wisconsin.)

**1. COUNTER-CLAIM—BREACH OF COVENANT—ACCEPTANCE OF CONTRACT WITH KNOWLEDGE OF COVENANTEE.**

A party who purchases property by an instrument of sale under seal, in which it is covenanted that a corporation from whom the seller acquired the property should fulfill its certain covenant in regard to the construction of a canal as therein specified, cannot, in an action for the unpaid installments of the purchase money, set up as a counter-claim the failure of such corporation to construct the canal according to specification, if such canal had been accepted by the seller, previous to the time of entering into the contract of sale, with the full knowledge of the purchaser.

**2. SAME—ACT OF UNITED STATES.**

The erection by the United States of a dam injuriously affecting a water-power conveyed by an instrument in which it is covenanted that the corporation from whom the seller acquired the property "should not construct, or allow to be constructed, a dam or other improvement" below such water-



power to its injury, is not a breach of such covenant, the land having been bought at a foreclosure sale, and subsequently conveyed to the government, and can not be set up as a counter-claim in an action for unpaid installments of the purchase money due under the instrument of sale aforesaid.

This was an action brought on a contract for the installments due on the purchase money of a water-power, so called, formed by the construction of a dam at the foot of Lake Winnebago, by means of which the water was forced through a canal, in the city of Menasha, about a mile in length, and given a fall of seven to nine feet. The defendants set up counter-claims, and the only questions involved related to their validity and effect. The plaintiffs, in 1875, sold to the intestate, Publius V. Lawson, an undivided half of the water-power, by an instrument under seal, whereby, among other things, the plaintiff covenanted with the defendant that the Fox & Wisconsin Improvement Company (a Wisconsin corporation chartered in the year 1853) should fulfill its certain covenants with Charles Doty and Harrison Reed and Curtis Reed, contained in a contract bearing date July 24, 1855, by which contract the improvement company, for a valuable consideration, sold to the other parties thereto the hydraulic power arising from the dam aforesaid, and the canal, which was then in an unfinished condition. And the improvement company covenanted, among other things, that it "would proceed to finish and build the said canal, and lock appertaining thereto, and that the said canal should be 100 feet wide at the bottom." The improvement company further covenanted in the same instrument that it "would not construct or allow to be constructed any dam or other work below, on the said river, which should raise the water above the ordinary stage at the foot of the rapids at Menasha, aforesaid."

The breaches assigned in the present action were—*First*, that the Fox & Wisconsin Improvement Company did not proceed to finish the said canal, and make the same 100 feet wide at the bottom, whereby the said hydraulic power and property so conveyed were less valuable than they would have been if the agreement had been fulfilled, by the amount of \$3,000; *second*, that it did construct, and had allowed to be constructed and maintained, a dam at the head of Grand chute, at the city of Appleton, Wisconsin, which has raised the water above the ordinary stage at the foot of the rapids at Menasha about two feet, and thereby reduced the head of water at the said canal, and has injured the value of said hydraulic power; for which damages to the amount of \$6,000 were claimed.

The said Doty, Reed & Reed, covenantees of the improvement company, conveyed, previous to the year 1875, one undivided half of the hydraulic power so transferred to them, to the plaintiffs in this action. The reply alleged that the covenant of the improvement company in regard to finishing the canal and lock was to the effect that it should be done by the sixth day of July, 1856, a date long prior to the execution of the contract declared upon in this action; and also that the improvement company had performed that covenant to the satisfaction of the covenantees therein named, who had received and accepted the work as completed within the time fixed therefor, and as full performance and satisfaction of the covenant for construction; of all which Lawson had notice at the date of entering into the contract with the plaintiffs. The plaintiffs denied that the intestate had sustained any damages on account of alleged non-performance of the covenant in question. And in regard to the allegation respecting the dam, the plaintiffs denied that the improvement company had constructed, or allowed to be constructed and maintained, a dam at the head of Grand chute, in the city of Appleton, as alleged in the counter-claim. And they denied that the intestate had sustained any damage on account of the construction of any dam.

The testimony showed that the improvement company, in 1855, claimed to be the owner of the hydraulic power, and desiring to purchase land owned by Doty and the Reeds, had made with them the agreement set out in the pleadings; that the canal was then in process of construction by the improvement company, and within the time fixed in the agreement the improvement company had constructed the canal to the satisfaction of Doty and the Reeds, and delivered the same to them; and both parties to the agreement had since then treated the same as fully performed in that respect, although in fact the improvement company had constructed the lower part of the canal only about 60 feet in width at the bottom, and not 100 feet, as agreed. There were other covenants in the same contract made by the improvement company, no breach of which was claimed to have been committed.

It appeared, also, that soon after the making and recording of the contract with Doty and the Reeds, and the delivery to them of the water-power and property conveyed by the instrument of 1855, the improvement company made, under date December 1, 1856, a deed of trust to a trustee as security for money borrowed by the company, in which deed of trust no exception or reservation was made by the

improvement company in respect to the construction of the dam below the Menasha water-power. Foreclosure was afterwards had under the deed of trust, and the whole property thereby conveyed was bid off to an agent, who soon afterwards transferred it to the Green Bay & Mississippi Canal Company. That company, after holding the property a few years and proceeding with the improvement, conveyed the whole of it, excepting the hydraulic water-power, to the United States, which purchased the same pursuant to the terms of an act of congress approved July 7, 1870. 16 St. at Large, 189.

The United States government had, before any of the proceedings mentioned, conveyed to the state of Wisconsin certain lands to be used by the state for the purpose of improving the navigation of the Fox and Wisconsin rivers, situated within that state, and the improvement company had been incorporated for the purpose of carrying on the work of improvement. The Green Bay & Mississippi Canal Company were engaged also in prosecuting the work after becoming the owners of the lands and other property, which the Fox & Wisconsin Improvement Company had previously held, and by the terms of the act of congress named, the government received the canals, locks, and certain other property of the Green Bay & Mississippi Canal Company, and proceeded with the work of improving the navigation of the two rivers. Before the date of the first contract, in 1855, the improvement company had already constructed a dam at Appleton, which remained continuously until superseded by the new dam built of masonry by the United States, which will be presently mentioned. But that dam, owing to the imperfect character of its construction, allowed large quantities of water to pass through, so that the navigation was imperfect, and no water was backed up by it upon the rapids at Menasha. The dam had fallen so much out of repair that when the United States assumed the work of improving the navigation, it proceeded to construct, and did construct, in 1873 and 1874, a new dam upon the site of this former dam, and of the same average height as the former dam, but so much better built that it produced, according to the testimony of the defendants' witnesses, a distinct rise of water above the height previously maintained, and did by several inches or a foot reduce the height of the head of water at Menasha. And it was for the injury thus sustained that the defendants sought to recover in the second counter-claim.

The amount of rise of water, the causes to which it was due, and amount of injury, if any, sustained by Lawson on account of it, were

controverted by evidence on the part of the plaintiffs. The plaintiffs also proved that the hydraulic power sold to Doty and the Reeds had been in their possession and in that of their grantees from the year 1856 down to the present time; that the intestate, Lawson, had been in possession of the same, and of the rents and profits thereof, after his purchase in the year 1875 until the time of his death, since the beginning of this action; that Lawson himself had been one of the lessees of a portion of the water-power before his purchase; had been a resident of Menasha, and had been well acquainted with the situation of the water-power and adjacent property for many years previous to his purchase; that no demand had been made upon the improvement company, either to enlarge the canal or to abate the dam which it had constructed, as above mentioned, nor had the improvement company in any manner consented, unless by its deed of trust above mentioned, to the construction or rebuilding of the dam on the part of the United States. The improvement company, in fact, had ceased to do any corporate act, and had become practically extinct, about the time of the sale of its property under the foreclosure above mentioned, in the year 1866.

At the conclusion of the evidence the plaintiffs moved for an instruction to the jury that the evidence did not show a valid counter-claim, and that the court should instruct the jury to render a verdict for the plaintiffs, disregarding the counter-claims.

In support of this motion it was contended by *Winfield Smith*, counsel for the plaintiff,—*First*, that the improvement company, having transferred the possession of the canal to Doty and the Reeds, and they having accepted the same as completely performed according to the covenant, and retained the same for nearly 20 years previous to the sale by the plaintiffs to Lawson, and Lawson being fully acquainted with the facts and the then situation of the canal, it must be held that Lawson purchased the property in the same condition in which it had so long existed, and did not acquire any right of action against the improvement company on account of not having completed the canal as required in the original contract; that the claim of Doty and the Reeds against the improvement company must be taken to be waived by the acceptance of the work, and the long failure to make any demand against the improvement company; and the covenant of Doty, made upon the sale to Lawson, must be construed as relating to such obligations as the improvement company was yet bound to perform; that in view of the facts it could not

be supposed that Doty and Lawson referred in their agreement to the former covenant respecting the size of the canal, which was treated by all parties as completely performed.

As to the dam, of which the defendants complained, it had been constructed by the United States a year or two *before* the sale by Doty to Lawson, and the existence of it was then as well known to Lawson as to Doty. Counsel argued that the covenant of Doty was in its terms and meaning prospective, and was not retrospective; that it did not relate to acts *previously* done or suffered by the improvement company, but must be construed to embrace only acts thereafter performed; that it could not have been contemplated by the parties to the contract that the vendors should cause the United States dam to be torn away or lowered; such a stipulation would be impossible to carry out, and would be absurd. The disadvantage, if any, was to be borne by the owner of the water-power, and the vendors could not be taken to have warranted against it. The plaintiffs cited the case of *Kutz v. McCune*, 22 Wis. 698.

The plaintiffs contended that the dam was not constructed by them, nor by the improvement company, nor had the improvement company allowed it to be constructed. It had given no sanction or permission to the construction or maintenance of the dam. The improvement company was not bound under its covenant to resist by force the construction of a dam, nor was it a breach of that covenant if the dam had been constructed even by its assent, provided the United States had an equal right to construct it without the assent of the improvement company; citing 6 Barn. & C. 295; 2 Biss. 428, 430.

The United States had constructed this new dam, not by virtue of its rights as grantee of the Fox & Wisconsin Improvement Company, but by virtue of its constitutional authority to improve the navigation of the Fox river in the state of Wisconsin. The dam was constructed only of the same height as the former dam, although in a better manner; and the defendants could claim no damages on account of the injury resulting from the mere improvement of the condition of the dam, so long as the height was not raised. *Cowell v. Thayer*, 5 Metc. 253.

It was also claimed that damages should be only nominal, unless facts tantamount to an eviction were shown, the covenant being claimed by the defendants to be in the nature of a warranty, and running with the land.

*W. J. Allen and Winfield & A. A. L. Smith, for plaintiffs.*

*Moses Hooper, for defendants.*

DYER, D. J., (*orally.*) The difficulties in the way of maintaining the counter-claims interposed by the defendants seem to be insurmountable. By the contract, dated July 24, 1855, the Fox & Wisconsin River Improvement Company granted to Doty and the Reeds the water-power in question. The corporation, in consideration of that grant, received the real estate mentioned in the contract, the canal by means of which the hydraulic power was supplied not being then completely finished. The improvement company agreed by the same contract to complete the canal in the manner therein prescribed within the time fixed by the charter of the company, which time expired in the year 1856. These are matters which are undisputed. The water-power and property then conveyed to Doty and the Reeds were delivered to them, and they and their successors have ever since had the possession and enjoyment thereof. Some work was done by the improvement company upon the canal in pursuance of the provisions of the contract, and as contemplated by the parties, and it was then turned over to Doty and the Reeds, but not in a fully-completed condition. Up to that time Doty and the Reeds had the right to call upon the improvement company to perform its covenant by making the canal 100 feet wide at the bottom thereof, according to the terms of the contract. But they did not do that; and it appears here from the testimony and as part of the history of the case that Doty and the Reeds regarded the canal as completed. At least they accepted it. They never called upon the Fox & Wisconsin Improvement Company to make the canal 100 feet wide. And admitting that there was a breach of covenant when the time expired within which the canal was to be made of that width, all that Doty and the Reeds thereafter had, if anything, was a right of action against the improvement company to recover damages for their non-fulfillment of that covenant. But it appears that no action of any sort was taken by Doty and the Reeds, either in the form of a claim of damages or to enforce performance of the covenant. They seem to have rested content with the canal as it was, and so it continued in the condition in which it was originally constructed for a period of between 19 and 20 years, and to the time when Doty conveyed to Lawson.

In the light of these facts I think we must regard the covenant in question as extinguished by the acts of Doty and the Reeds, and that

it had no vitality at the time this transfer was made to Lawson. It is part of the history of the case—at least it has so been stated, and the court has accepted it as an undisputed fact—that the property of the Fox & Wisconsin Improvement Company was sold under a mortgage foreclosure; that it was bid off by a third party, who afterwards conveyed it to the Green Bay & Mississippi Canal Company, and that company afterwards conveyed the same to the United States. And I am unable to avoid the conclusion that, when the transfer was made to Lawson, what the parties must necessarily have had in view were such covenants in this contract between the improvement company and Doty and the Reeds as were then in force, and as were then prospective in their character and operation; because it would be absurd to say that Lawson and Doty, when they made their agreement on December 31, 1875, had in mind any covenants or agreements in the contract between the improvement company and Doty and the Reeds, which had become by the acts of the parties, or other cause, extinct. Applying to the case familiar rules of construction, we must, in construing this agreement between Doty and wife and Lawson, take only into consideration such covenants in the contract between the improvement company and Doty and the Reeds as were *in esse* at the time of the transfer to Lawson. And the acts of the parties, the manner in which this canal and water-power were dealt with and were used during the long term of years which elapsed between the making of the contract of 1855 and the conveyance to Lawson, seem to afford conclusive evidence that the covenant to make the canal 100 feet in width was regarded as having no longer any effect. The interests and rights of the improvement company in the property had become extinguished by virtue of the proceedings under which the title became ultimately vested in the United States. These parties were all living at Menasha. The court must presume that they understood the *status* of affairs and the condition of the property; and, construing the contract in the light of all the surroundings and of all the circumstances in which the parties were placed at the time, it seems to me the conclusion is unavoidable that this covenant in the contract between the improvement company and Doty and the Reeds, that this canal should be made 100 feet wide at the bottom, had become extinguished by the lapse of time and the acquiescence of the parties. And, as I have stated, it is not, I think, to be successfully denied that the clause in the Lawson conveyance referring to covenants in the improvement company contract, was intended to cover such things as were yet to be done by the improvement com-

pany. And so, upon the grounds and for the reasons stated, I think the first counter-claim cannot be maintained.

Now, as to the second counter-claim, which has its source in that covenant in the contract between the improvement company and Doty and the Reeds which provides that the party of the first part "will not construct, or allow to be constructed, any dam or other work below on said river which shall raise the water above the ordinary stage at the foot of the rapids at Menasha, aforesaid," as I understand the learned counsel for the defendant, his position is that this covenant is equivalent in law to such a covenant against incumbrances as is usually incorporated in conveyances of real estate; and he has read to the court various cases in which it has been held that a breach of a covenant against incumbrances occurred where, for example, there was a highway over the land conveyed, and the grantee in the conveyance knew, at the time he took it, that the highway was in existence upon the land. Is this clause equivalent to such a covenant against incumbrances as I have just spoken of; that is, a covenant on the part of the improvement company that there did not exist, and should not in the future exist, a dam or other work below on the river which should raise the water above the ordinary stage at the foot of the rapids at Menasha? I think not. A distinction is to be taken between the covenants on this subject in this contract and an ordinary covenant against incumbrances, which is well understood to be a covenant that relates to the past—relates to what may have been done in the past with reference to the property that is conveyed. The clause which we are considering in this contract is a clause which was intended to cover things which might be done in the future. Its language is, "The party of the first part doth further covenant that it will not construct and will not allow"—that is, will not allow to be constructed—"any dam or other work below on said river."

We find it to be an admitted fact in the case that at the time the contract was made there was a dam in existence on the river below the rapids at Menasha, namely, the dam at Appleton which has been spoken of. That dam was in existence, I say, at the time this contract was made, and it must be presumed that the parties knew that fact, and that they contracted with reference to it at the time. Then we find, further, as I have before remarked, that all the rights and interests of the improvement company passed from it by the mortgage foreclosure; that the Green Bay & Mississippi Canal Company became vested with these rights, and that they were ultimately acquired by the United States. And then the United States, by virtue



of its sovereign power and authority, took charge of this improvement, and, for the purpose of improving the navigation of the river, constructed in place of the old wooden dam, what has been spoken of as the present solid masonry dam, which I understand counsel to concede is of no greater height than the old dam would have been if it had been in a proper state of repair; so that we have a case where, at the time the contract of 1855 was made, the parties to it on both sides knew that a dam was then in existence across the river. The proofs show that Lawson was long a resident of Menasha. He made this contract with Doty and wife in December, 1875, and at that time the government dam had been constructed. Now can it be said, in the first place, that Lawson was in a position, after he made this contract with Doty, to complain of the existence of that dam at Appleton? And, in the second place, can it be said that the Wisconsin Improvement Company, within the language and meaning of this contract, allowed the dam to be constructed? It seems to me that both of these questions must be answered in the negative. In defining the word "allow," as it is used in that contract, we must take it in its ordinary and popular sense, and there is quite clearly implied in the use of that word the understanding or expectation of the parties at the time that the improvement company would continue in such relation to the property that it might, if so disposed, by some affirmative act on its part, facilitate or permit the construction of a dam below the rapids, and this it was intended by the contract to prevent. The word "allow," in its ordinary sense, means "to grant," "to admit," "to afford," or "to yield," "to grant license to," "to permit;" from which is implied a power to grant some privilege or permission.

No argument is needed to show that the Fox & Wisconsin Improvement Company was not in a position to do any such thing as that when the government entered upon this enterprise and rebuilt this dam. The improvement company was in a position where it could prevent nothing; it could suffer nothing. The United States could proceed in the construction of this dam independently of the improvement company, without its consent, against its protest. And I think it must have been in the contemplation of the parties to the contract of 1855, at that time, that the Fox & Wisconsin Improvement Company would continue in its relations to the property as then existing, and that it was intended by the contract to deprive it of the right, by any affirmative act on its part while exercising authority and control over the improvement, to allow a dam to be constructed which should raise the water above the ordinary stage at

the foot of the rapids. It is true, as suggested by Mr. Hooper, that the question of the powers and rights of the United States with reference to this property is a grave one, and for a correct solution of it in all its bearings much more consideration may be needed than we are able to give to it now. But at present I am not able to see how the argument is to be met, that when the United States stepped in and acquired dominion and control over this property for the purpose of improving navigation, it had the right by virtue of its sovereign power—so far, at least, as the interests of the parties now before the court are concerned—to build the Appleton dam; and I do not see how that act of the government can be regarded as one covenanted against by the Fox & Wisconsin Improvement Company when that company made its contract of 1855 with Doty and the Reeds.

These are at present my views upon the questions here presented, and it results that in the opinion of the court the second counterclaim is not maintainable.

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THOMPSON *v.* HAWKS and others.

(Circuit Court, D. Indiana. January, 1883.)

**WILL—UNDUE INFLUENCE—SPIRITUALISM.**

Where a testator embraced spiritualism as practiced by his beneficiary, who claimed to be a spirit-medium, and instead of merely believing in it as an abstract proposition, the testator became possessed of it and suffered it to dominate his life, and where his belief in spiritualism was artfully used by the beneficiary to alienate him from his only son and child and to get his property, *held*, that a will made in such a mental condition and under such influences should be set aside

*John H. Stotsenburg and D. C. Anthony*, for plaintiff.

*A. Dowling and La Follette & Tuley*, for defendants.

GRESHAM, D. J. John Thompson died in Louisville, November 14, 1877, aged 76 years, leaving a will, which was executed February 25, 1875, in New Albany, by the terms of which he bequeathed all his property to Mrs. Amanda E. Hawks, who is one of the defendants. George Thompson, the plaintiff, is the only child of the testator, and brings this suit against Mrs. Hawks and her husband to set aside the will on account of the mental incapacity of the testator, and the undue influence over him of the devisee. The reasons assigned by the

testator in his will for disinheriting his son are the neglect of the testator during the last illness of his second wife, and during his own illness in the winter of 1873, and the circulation of injurious reports concerning him by his son. Without stopping to detail the testimony, or the relations of the father and son for several years previous to the death of the former, it is sufficient to say that the accusations in the will against the son seem to have been the result of a delusion. Whatever disagreements there may have been between them, their relations are not shown to have been so inharmonious as to account for the strange and unnatural disposition which the father attempted to make of his property.

Mrs. Hawks knew the family of John Thompson as early as 1856. For some time she lived near them and under the same roof in New Albany. In 1860 she removed to Louisville. The friendly relations between herself and the Thompson family continued after her removal, and when the second wife of the testator died and when he became sick, she visited their house frequently and attended to their and his wants. Some time after 1870, Mrs. Hawks became what is known as a spirit medium, and the testator became much interested in spiritualism, and visited her often and regularly. Previous to that time, and during visits in Iowa, he had exhibited signs of mental aberration in his intercourse with his relatives and acquaintances there. He had a sister and niece who were deranged and in insane asylums. Mrs. Hawks made him acquainted with the mysteries of spiritualism; she undertook to "develop" him, and enable him to become a medium who could communicate directly with the spirits of the dead. He began to talk among his acquaintances about sending and receiving messages to and from his deceased wives. He endeavored to obey sedulously every trivial injunction that he received in this way from them, even to keeping the cow away from the rose-bushes in his yard. He carried a little basket on his arm on his visits to Mrs. Hawks, in which he told some of the witnesses he was taking coffee and delicacies to Mrs. Hawks for his deceased wives, which Mrs. Hawks would forward to them, and at least one of these visits was made in the same month that the will was executed. He began to talk freely about disposing of his property to keep it out of his son's hands, and about disinheriting his son, although, strange to say, Mrs. Hawks testifies that nothing on these subjects ever passed between them, notwithstanding their great intimacy. On January 29, 1874, he did convey his real estate in New Albany to Mrs. Hawks, for the consideration of \$2,800, which she says she paid him

in money in the recorder's office in New Albany. There is no other witness of the payment. She was then the wife of a poor shoemaker, with two children, 16 and 17 years old. She says that her husband had inherited \$500 of this sum, and she had a legacy, the amount of which is not stated. On July 28, 1875, she obtained a quitclaim deed from the testator to the same property, for which she paid \$50. On January 7, 1876, she reconveyed this property to the testator for \$2,900.80, taking his notes for \$1,652.30, secured by mortgage on the property, and receiving the balance in money. She gives as the reason for the reconveyance that having failed in two lawsuits against George Thompson, for having erected buildings on the ground adjoining hers, which darkened her windows and damaged her property, she became dissatisfied with it, and the testator took it back to please her, at the price mentioned. But it is also worth mentioning, that between the original conveyance to her and the conveyance back to the testator he had made his will leaving everything to her.

Before and after the conveyances to Mrs. Hawks, and the execution of the will, the testator informed several persons that he had been directed by the spirits of his deceased wives, through Mrs. Hawks, to dispose of his property; that he had been advised by them that it was necessary for his development to do so; and that he had received sundry warnings against his son, and injunctions to "do well by" Mrs. Hawks, from the same source. Numerous acts of eccentricity are detailed by the testimony, which it is useless to recapitulate. There is some evidence tending to show that the husband of Mrs. Hawks was addicted to drink, and was unable to provide his family with the commonest necessities of life; that Mrs. Hawks expected to inherit a fortune from the testator; and that he had money and bonds which have not been discovered since his death. The general agreement of all the plaintiff's witnesses—of those in New Albany, in Ohio, in Kentucky, and in Iowa—is a strong corroboration of the testimony of each of them. Several credible and disinterested witnesses, with good opportunities for estimating the mental condition of the testator, testify that they think he was sane, but they never observed those acts which impressed other witnesses with a different belief, and their testimony ought not to outweigh the positive testimony of those who were cognizant of unmistakable evidences of a disordered mind.

It is useless to discuss here the proposition as to whether or not a spiritualist can make a valid will, or as to whether or not a man who has a monomania on one subject is capable for the general trans-

action of business which does not concern that subject. The testator was in a weakened state of mind when he came under the influence of a spirit medium. He embraced spiritualism as practiced by the spirit medium, and instead of merely believing in it as an abstract proposition, he became possessed by it and suffered it to dominate his life and override every other consideration. His belief in it was artfully used by the spirit medium—the only one, it appears, whom he ever consulted—to alienate him from his only son and child, and to get his property.

A will made in such a mental condition and under such influences ought to be set aside.

Finding and judgment for the complainant accordingly.

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**PRESUMPTION OF UNDUE INFLUENCE.** The law presumes that undue influence has been used where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser, or where other close confidential relationships exist. Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof besides the *factum* of the will is required. (a) This rule applies with peculiar force to wills made in favor of the testator's priest, confessor, clergyman, or spiritual adviser. (b) The burden of proof is upon those seeking probate of such a will to show that such presumed influence did not in fact or in any degree induce the giving of the legacies. (c) Direct proof of undue influence is not required; it may be inferred from circumstances. (d) But where a testatrix, who was a Roman Catholic, bequeathed the bulk of her property to a Roman Catholic priest, who had been for many years her confessor, and who had resided in her house, it was held that it was incumbent on those who pleaded undue influence to show it affirmatively; that it could not be presumed merely from the relations between them and the bequest. (e) It was said, in the case last cited, that the doctrine of undue influence adopted in courts of equity in regard to gifts *inter vivos* (f) did not apply to the making of wills; that the natural influence created by the relations of parent and child, attorney and client, confessor and penitent, etc., was not held to be undue by the court of probate, but might lawfully be exerted to obtain a will or legacy, as long as the testator thoroughly understood what he was doing, and was a free agent. In another English case it was said that a strong case must be made out to set aside a will for undue influence, but that where a

(a) Marx v. McGlynn, 88 N. Y. 357.

(b) Id.; Thompson v. Heffernan, 4 Drury & War. 285.

(c) St. Leger's Appeal, 34 Conn. 434, 450.

(d) Drake's Appeal, 45 Conn. 9.

(e) Purfitt v. Lawless, 2 L. R. P. 462; 41 L. J. P. 68; 27 Law T. (N. S.) 215; 21 W. R. 200.

(f) Gift to Methodist preacher, Norton v. Relly, 2 Eden, 286; spiritual medium, Lyon v. Home, L. R. 6 Eq. 655; donatio mortis causa to clergyman, Thompson v. Heffernan, 4 Drury & War. 235. And see Nottidge v. Prince, 2 Giff. 246.

person, acting as the spiritual adviser of a testator, takes advantage of that situation to become the agent and manager of the testator's temporal affairs, and while holding those opposite characters becomes a donee of very large gifts under the testator's will, there is a strong ground made out for inquiry as to undue influence.(g)

Such presumption may arise, although the one occupying such a relation to the testator is not a devisee or legatee. Thus, the rector of a church, which was residuary legatee and had the nomination to two scholarships created by the will in a theological seminary, who superintended its execution, and was named therein as sole executor, was held to be so interested in the will as to raise a presumption of undue influence, and to require proof of spontaneity and volition—affirmative proof on the part of the executor of good faith, and a proper use of the confidence placed in him.(h)

The presumption is one of fact, and if the will is fairly made the law does not condemn it.(i) The earnest presentation to a testator by a spiritual adviser of proper arguments and the enforcement of motives, whereby the intellect is persuaded and the conscience quickened, are declared in *Merrill v. Rolston*(j) to be legitimate influences, and the results praiseworthy, where they do not violate natural obligations.

**RELIGIOUS DELUSIONS—SPIRITUALISM.** Proof that the testator held peculiar religious beliefs does not establish his incompetency to make a will. Thus, where the testator believed there were degrees in heaven, and that his pre-eminence there depended materially on the amount of property he acquired and the charitable purposes to which he appropriated it, it was held that the will might be valid; that the jury were properly instructed that if they believed that the testator was under the belief that the doing of some great charitable deed would advance him to a high state in heaven, and that the delusion was so absurd and visionary as to amount to insanity, and that he executed the will under its influence, it would be sufficient to avoid it.(a)

A belief in spiritual communications is not *ipso facto* an insane delusion, rendering the believer incapable of making a valid will.(b) In the case cited, the testatrix believed that by means of spiritual communications her deceased husband had either dictated the will or expressed his approval of its provisions, and she also believed that the husband of her only child was possessed of a familiar demon, that enabled him to control his wife's affections and alienate them from the testatrix. The decree admitting the will to probate was affirmed, the court holding that it was for the jury to determine whether this belief had brought her to the state of unsoundness of mind by reason of insane delusions, and whether such delusions operated upon her in making the will. Her belief that her husband had dictated the will did not show undue influence—that it was the will of another overriding her own. If she yielded her own will and judgment, exercising no free agency, then it was not her will, but another's, as much as if actually dictated by a living person; but if

(g) *Middleton v. Sherburne*, 4 Younge & C. 358. Compare *Huguenin v. Basely*, 14 Ves. 273.

(h) *In re Welsh*, 1 Redf. 233; *S. C.* 1 Redf. Am. Cas. on Wills, 506.

(i) *Marx v. McGlynn*, 88 N. Y. 357.

(j) 5 Redf. 220.

(a) *Gass v. Gass*, 3 Humph. 273. See, also *Weir's Will*, 9 Dana, (Ky.) 434; *American Bible Society v. Stover*, 12 Weekly Dig. 213.

(b) *Robinson v. Adams*, 62 Me. 369.

she acted her own will and judgment, and did not abandon both to the supposed wishes and opinions of her husband, there was no undue influence, although the testatrix might have had full faith in the supposed communications, and have regarded them as her husband's advice. The same rule as to undue influence of this kind was applied in another case, where the will of a spiritualist was upheld, although he believed that he had received, through spirit mediums, communications from his deceased wife, had consulted mediums concerning his business and proposed inventions, and had engaged in speculation on advice from such sources. It appeared that he believed in two kinds of spirits,—some that would deceive him and others that were reliable,—and that if the advice accorded with his own judgment, he believed it came from the latter class, and followed it; but if it did not accord with his judgment, he believed it came from the former class and disregarded it. The court said: "He brought them all to the test of his judgment and acted accordingly. It is difficult to find evidence of insane delusion, or any peculiar exposure or liability to undue influences, in a faith thus absolutely subordinated to the judgment." (c)

Where, as in the principal case, the spirit medium is a beneficiary under a will made in accordance with such communications, the burden is upon those seeking its probate to show that it was the voluntary and well-understood act of the testator's mind. From such a relation, the exercise of dominion and influence by the medium over the mind of the testator is implied. (d)

WAYLAND E. BENJAMIN.

(c) *Smith's Will*, 52 Wis. 543.

(d) Compare *Lyon v. Home*, L. R. 6 Aq. 656.

## HUNTINGTON and others, Assignees, v. SAUNDERS and others.\*

(Circuit Court, D. Massachusetts. February 6, 1883.)

### BANKRUPTCY—SUIT AGAINST BANKRUPT—BILL NOT SUSTAINABLE.

A bill brought by the assignees of a bankrupt against him and his wife, to recover property, or its proceeds, charged to have been bought by the bankrupt with his own money, and placed in the hands of his wife, from time to time, within eight years before his bankruptcy, but which did not describe the property, and in which no facts are alleged, except that by information from some person not named, who heard a statement or statements made by the husband, or who is in a position to be informed that some one else heard such statement or statements, and which bill seems to be founded only on suspicion and inference, without information of any specific facts, cannot be sustained on demurrer and will be dismissed.

### In Equity.

The plaintiffs, as assignees in bankruptcy of William A. Saunders, bring this bill against him and his wife to recover property or its proceeds, charged to have been bought by the bankrupt with his own money, and placed in the hands of his wife, from time to time,

\*Affirmed. See 7 Sup. Ct. Rep. 356.

within eight years before his bankruptcy, in 1875. The bill alleges that the plaintiffs have obtained about \$23,000 by settlement with the wife for such property, but the bill is supposed to relate to some other and distinct property. A demurrer to the bill was sustained, and a new bill has been filed by amendment.

The defendants demur again to the amended bill for uncertainty in its charges, and for want of equity, and because of the bar of the special statute of limitations contained in the bankrupt law. Those parts of the bill which are material to these questions are substantially as follows: That for 16 years before 1875 the bankrupt was possessed of a large amount of property, of the estimated value of \$200,000; that he failed in 1875, and has been ill and confined to his house ever since, and has disclosed very little property, though his debts were about \$300,000; that he has not rendered proper accounts, etc.; that for a period of eight years before his bankruptcy, he, at divers times, procured with his own means, and transferred to and placed in the hands of his wife, divers large amounts of personal property in the form of money, bonds, stocks, and other like securities, being in the whole of great value, to-wit, of the value of \$50,000, none of which can the plaintiffs more particularly describe, because information is withheld by all persons who have it to give, and because the property has been invested for income, and often changed in form by reinvestment, and in pursuance of devices for more effectual concealment. Proper averments are now made in the amended bill to show that such gifts were constructively fraudulent as against creditors.

To avoid the bar of the statute the plaintiffs allege that they had no information, notice, or definite suspicion of the said transfer and concealment of personal property until about the first of July, 1880, when they were informed by a person who was in a position to have information about the matter, but whose information was unknown to the plaintiffs, that for many years prior to his bankruptcy the said William A. Saunders, from time to time, purchased bonds in Boston to be presented to his wife, as he then stated; that thereupon they examined the wife and two other witnesses in the bankruptcy, who admitted that the wife had property, which, however, they officiously declared to be her own, and the plaintiffs are satisfied, on inquiry, that this fund was not derived from her separate estate, and therefore bring this suit.

*George W. Park*, for complainants.

*J. H. Young*, for defendants.



LOWELL, C. J. One of the defendants' objections seems to be well taken, and perhaps two. This bill will not lie for money received by the wife, under the decision of the supreme court in *Phipps v. Sedgwick*, 95 U. S. 3. It is not, therefore, an equitable *assumpsit* or trover, but replevin for the recovery of specific property conveyed by the husband to the wife by way of gift, when he was insolvent, or specific property into which the first has been converted. The plaintiffs do not make out any case, which can be admitted or denied, for the recovery of any such property. It is plain that they neither know nor have information of any such property. Some one, who was in a position to have information, has told them "that for many years prior to his bankruptcy the said William A. Saunders, from time to time, purchased bonds in Boston, to be presented to his wife, as he then stated," and thereupon they examined her and other witnesses, and discovered that she has property which on inquiry they do not believe was derived from her separate estate, though she and all the other witnesses swear that it was.

What specific property do the plaintiffs seek to recover? They do not know. They wish to put the defendant Mary P. Saunders to the proof of the general denial that she holds any property by gift from her husband, made after he became insolvent, except that for which the bill alleges that she has already paid \$23,000 by way of compromise. There are no facts alleged except that by information from some person not named, who heard a statement or statements made by the husband, or who is in a position to be informed that some one else heard such statement or statements, that the husband bought bonds between 1867 and 1875, to be presented to his wife. Suppose the bill were taken *pro confesso*, what decree could be made upon it? What injunction could be framed under it? None, must be answered to both these questions. The parties sustain no such relation to each other that a general bill for an account will lie as it might if the defendant Mary had been a partner with or bailiff of her husband. I am of opinion, therefore, that there is nothing in the bill which requires an answer. It seems to be a bill founded on suspicion and inference, without information of any specific facts.

Then why was not the suit brought within two years? There are general allegations of concealment, which, possibly, might save the bill on demurrer. But, taking all the charges and statements together, and supposing them sufficiently definite, it is very doubtful whether there has been any concealment. It may be that a bankrupt is bound to disclose to his assignees whatever his creditors could possibly have

any right to take, and that his silence would be a concealment. But the wife is not the bankrupt, and it is against her that the bill is brought. The bankrupt is not a proper party to a bill of this kind, except to join with his wife in a conveyance which may be ordered by the court, if the state law makes his joinder necessary. Whether any such property is involved in this case no one can say. Formerly, it was the practice in England to make the bankrupt a defendant in such cases; but this was when the very absurd practice prevailed of permitting him to dispute his bankruptcy collaterally, and therefore it was necessary that he should be called on in every suit in chancery to admit or deny the title of his assignees. The law of this country, under the statutes of the states and the acts of congress, except that of 1800, has always been that the adjudication of bankruptcy is conclusive. This is now the law of England, and in neither country is the bankrupt a proper party, except as I have above stated.

Now, it is by no means clear on this bill that the wife has concealed anything. If gifts from husband to wife are assailed, it is because they are thought to be unjust to his creditors, under all the circumstances, by reason of his condition as to debts and property when they were made. They are constructive rather than actual frauds, and there is, generally speaking, no concealment of the fact that such a piece of land or such a share of stock has been given. However, my decision is placed upon the point first considered.

Demurrer sustained. Bill dismissed.

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### STARRETT v. ATHOL MACHINE Co. and others.

(Circuit Court, D. Massachusetts. January 31, 1883.)

#### 1. MANUFACTURING—PARTNERSHIP—INFRINGEMENT OF PATENT—RESPONSIBILITY.

Where a manufacturing company and a firm entered into a contract, by which the former let out to the latter all the power, machinery, etc., of the company, to be used for the manufacture of tools, and for carrying on the business of the company agreed to be done by the latter parties in co-operation with the directors, the firm agreeing to pay as rent 10 per cent. of their net sales, the profits of the consolidated company to be shared in certain proportions, *held*, that the manufacturing company are not responsible for the manufacture of trysquares complained of, made by the firm for its own use in the rented premises.

#### 2. SAME—LANDLORD—INJUNCTION.

May a landlord be enjoined from permitting his tools and machinery to be used for the injury of a third person? *Quære.*

## 3. PATENTS FOR INVENTIONS—TRY-SQUARES.

An improvement in try-squares, which produces a tool more convenient, with a larger capacity, and more accurate, by adding to such a tool a slot in one of the arms, is a patentable invention.

## 4. SAME—REISSUE—VALID IN PART.

Whether a reissue is wholly valid or not, it may be valid to the extent that claims in the original and in the reissue are alike; and if those claims are infringed, an injunction may be granted.

In Equity.

*George D. Noyes*, for complainant.

*Wm. Edgar Simonds*, for defendants.

LOWELL, C. J. This suit for the infringement of two patents for improvement in try-squares, is brought against the Athol Manufacturing Company, a corporation established under the laws of Massachusetts, and George T. Johnson, joined as president of the company, together with Daniel A. Newton and Stephen H. Bellows, who, it seems, are copartners in the making of tools under the firm of the Standard Tool Company. The defendants deny that the Athol Company has anything to do with the tools which have been made and sold in supposed infringement of the plaintiff's rights. They produce in evidence a contract between the company and the firm of Newton and Bellows, by which the former let out to the latter all the power, machinery, etc., of the company, to be used for the manufacture of tools, and for carrying on the business of the company, which Newton and Bellows agree to do in co-operation with the directors. Newton and Bellows agree to pay, as rent, 10 per cent, of their net sales; and, as to the business of the company, the profits are to be shared in certain proportions between them and the company. This contract, if I understand it, is in reality two contracts,—one for the hire of machinery, etc., and the other for a sort of partnership. The defendants say that the tools complained of were made by Newton and Bellows for themselves, under the first part of the contract, and not as part of the business of the company. If so, I do not see that the company are accountable. Newton and Bellows are directors in the company, and the agreement, in so far as it makes, or purports to make, a sort of partnership between the parties, may be illegal and *ultra vires*; but that does not affect the question whether the Athol Company make these try-squares. The fact that they receive 10 per cent. of the net sales by way of rent, does not give them such an interest in the try-squares, or in the business, that they are responsible for the profits of the manufacture. The plaintiff insists that the whole contract is a device to shield the Athol Company as infringers. But this is not

proved. There is, however, some evidence tending to show that the company have made tools for the express purpose of manufacturing these try-squares, and, perhaps, that they made a few of the squares before the contract with Newton and Bellows went into effect. Besides, I am not sure that a landlord may not be enjoined from permitting his tools and machinery to be used for the injury of a third person; at least, if he has any power to prevent it. I think an injunction should go against all the defendants; but when it comes to the accounting, the plaintiff must prove before the master that the company is liable to him in profits or damages, under the risk of what the court may order concerning costs.

The first patent which I shall consider, second in order of time, is No. 229,283, dated June 29, 1880. The patentee says, in his specification:

"The try-square hereinafter described is not only to be used as an ordinary try-square, but can be employed for determining the center of a circle. \* \* \* In carrying out my said improvement, I construct or provide the head with two arms, *a*, *b*, of equal length, rigidly connected, and arranged with their inner surfaces straight and at a right angle to each other; and I form in the head and through one of the arms, midway between its opposite edges, a slot, *c*, to receive the ruler or slide-bar; such slot being arranged so as to cause the upper edge of the ruler or slide-bar, when against the upper edge of the slot, to stand at an angle of 45 degrees with the inner face of the two arms."

He then describes the movable head, and the clamping devices, and the manner of using the instrument.

The first claim is substantially like the third, and these are infringed:

"(1) The head not only provided with arms of equal length, and being rigidly connected with each other, or in one piece with the body of such head, and arranged with their inner faces at a right angle, but having in its body and through one of such arms, and midway, or essentially so, between its opposite edges, a slot to receive a rule or slide-bar, such slot terminating at one end of it, at the vertex of the angle of the two arms, and being made through an arm of solid stock, to give a working face that will allow either side to be laid down, all being substantially as set forth."

The state of the art is that the earlier patent of the plaintiff contains the movable head, rule, and clamping devices precisely like those in this patent, but with only one arm; and that try-squares with two arms had been made before, but not provided with a slot through one of the arms. The question is whether the change is patentable. There seems to be no doubt that the plaintiff's tool is more convenient, that it has a larger capacity, and, perhaps, a little

more accuracy, from the arrangement of carrying the rule through a slot in one arm, than any which are proved to have preceded it. Its convenience is obvious on inspection. The plaintiff's expert considers that there is invention in this; that is, that a mechanic would not, from mere knowledge and skill, construct a try-square in this way, having the older forms before him. The defendants' expert says that nothing has been done but to duplicate the parts of older try-squares. He means, I suppose, that any mechanic would make this duplication in this way; for it is not true that it is a mere duplicate; it is one *plus* a slot. I am of opinion that this change involved invention.

Like questions arise under the other patent, which is reissue No. 9,419. The defendants have copied the plaintiff's tool, but they deny patentability, and that the reissue, which was taken out about 19 months after the original, is valid. The defendants own the patent of one Chaplin, on which they have sued the plaintiff, as I understand; and there is no doubt that the plaintiff's tool gets many of its best features from Chaplin's patent, and from tools and drawings which were lent him by Chaplin. Whether the reissue of Chaplin is valid, and whether the plaintiff infringes it, are questions which have no bearing on this case.

It is not easy to describe the differences between these tools intelligibly without the drawings. The changes which the plaintiff has made are (1) in changing the form of his "stock" so that it has a rectangular base so broad that the clamp-screw which slides on the rule or bar is wholly within the stock, and protected by it from dirt and wear, and from falling out; (2) a pin through the top and clamping screw, which keeps it from turning round when not clamped; (3) the groove of the bar has a rectangular shape in cross section, instead of a slightly-beveled face; (4) the spirit-level is placed inside the stock, instead of being firmly attached to it, as in one of Chaplin's exhibits. The third and fourth appear to me to be changes of form, without changes of function or mode of operation, and not to be patentable. The first and second I consider to be patentable improvements in the tool, though not of great apparent difficulty.

Whether the reissue is wholly valid or not, it is so to the extent that claims in the original and in the reissue are alike and have been infringed. *Gould v. Spicer*, C. C. R. I., August, 1882. The original patent, No. 215,024, seems to me to explain the improvements clearly enough: "The working edges, *c, e*, of the stock are placed far

enough apart for the bottom upper edge of the bar recess to be long enough to afford a suitable bearing for the bar, and also to admit of the boss being made between them, whereby the clamp is not only covered and protected on all sides and sheltered from dirt and extraneous matters, but is prevented from accidentally slipping sidewise out of the groove of the bar." Following an identical clause in the reissue, there is another which enlarges on the same subject, showing certain additional advantages of this feature of the invention, but it adds nothing to the description of the tool itself. The original patent claims: "(1) The stock provided with the bar-receiving recess and boss, as described, and with the clamp arranged in such recess and boss substantially as set forth." This covers the ground, and is like claim 6 of the reissue, which, therefore, I hold to be valid, and to have been infringed.

Interlocutory decree for complainant.

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**HOE and others v. BOSTON DAILY ADVERTISER CORP'N and others.**

(Circuit Court, D. Massachusetts. February 8, 1883.)

**PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—WHEN DENIED.**

Where the contest is in fact between rival manufacturers, and the improvement in question is part of a large machine in daily use to print newspapers of the defendants, and a change of such part is difficult and might embarrass the usual course of business of defendants and cause much expense to their guarantors from whom they purchased, and would be of no advantage to plaintiffs, except to coerce a settlement of the royalty, a preliminary injunction will be denied.

Whether an injunction would be granted under similar circumstances after final hearing, *quære*.

In Equity.

*B. F. Thurston, Munson & Phillip, and F. P. Fish*, for complainants.

*B. F. Lee*, for defendant.

LOWELL, C. J. This is a motion for a preliminary injunction to restrain the further use of that part of the machinery of a printing-press for newspapers which is mentioned in claim 3 of patent No. 131,217, issued to the plaintiffs September 10, 1872. In a suit by these plaintiffs against one Kahler, in the southern district of New York,\* Mr. Justice BLATCHFORD has decided that the patent is valid,

\* 12 FED REP. 111.

and that claim 3 refers to a distinct part of the machinery, and embodies a sufficient and independent invention, and that the defenses of want of novelty and non-infringement, and certain more technical points taken in that case by the defense, were not sustained by the evidence. The improvement is a useful and ingenious one, and the only doubt of its novelty appears to have arisen from the fact that it was left for a long time unused, and, in the mean time, one Campbell had made, or nearly made, a similar invention. Infringement depended upon the construction of the third claim. The technical points were that the invention was made by one of the patentees alone, and that the preliminary oath was taken before a person not authorized to administer it. Besides giving the weight which must always be given to a deliberate decision of a circuit court, I have examined the record of *Hoe v. Kahler*, and agree with the conclusions arrived at. I see no reason to suppose that any new evidence is likely to be produced in this suit. The defendants bought a machine of the successors of Kahler, and are indemnified by them; and they concluded their purchase after notice of the plaintiff's rights. The contest is, in fact, between rival manufacturers.

Is this a case for an injunction? The improvement in question is but part of a large machine, upon which the daily newspaper of the defendants is printed, and a change of this part of it, though possible, is difficult, and might embarrass the usual course of business of the company, and would cause much expense to the defendants, or, rather, to their guarantors. Nor would it be of any advantage to the plaintiffs, except to coerce a settlement, for they do not use printing machines, but make and sell them in the market. Whatever they are entitled to in the way of damages, amounts, in effect, to a royalty. Their real damage was suffered when this machine was bought, and is not affected by the amount or duration of its use. Acting on this view of the matter, the parties have been negotiating for the payment of a license fee, but are very far apart in their estimate of its amount. The only advantage which the plaintiffs could derive from an injunction, would be to put them in a better situation than they are now in, or than the defendants will then be in for the further conduct of the negotiation. If the case were in such a situation that I could now decide the question of damages, I might, perhaps, order an injunction, unless that amount were paid within a reasonable time.

The decisions which refuse an injunction, in cases very like the present, have been collected by the diligence of counsel. In some of them the courts deny that there is any remedy in equity when the

real damage is in the nature of a royalty. See *Howe v. Morton*, 1 Fisher, 586; *Sanders v. Logan*, 2 Fisher, 167; *Stainthorp v. Hunniston*, Id. 311; *Morris v. Lowell Manufg Co.* 3 Fisher, 67; *Wells v. Gill*, 6 Fisher, 89; *Amer. Mid. Purifier Co. v. Christian*, 3 Ban. & A. 42; *Colgate v. Gold & Stock Telegraph Co.* 4 Ban. & A. 415; *N. P. R. Co. v. St. Paul, etc., Ry. Co.* 4 FED. REP. 688; *N. Y. Grape Sugar Co. v. Amer. Grape Sugar Co.* 10 FED. REP. 835.

I look upon this as much like a final hearing, since every fact and argument at present available has been brought to my notice; but if it were final, there are several cases which hold that an injunction will not be granted even then if the plaintiff can be fully compensated by the payment of money, and there will be much hardship in enforcing it. Some of the decisions above cited were virtually final, because the same courts had already decided, as against a different defendant, all the questions of validity and infringement; and in the following cases an injunction was refused at the final hearing: *Lowell Manufg Co. v. Hartford Carpet Co.* 2 Fisher, 475; *Bliss v. Brooklyn*, 4 Fisher, 596; *McCrary v. Pennsylvania R. Co.* 5 FED. REP. 367; *Ballard v. Pittsburgh*, 12 FED. REP. 783. So, in *Forbush v. Bradford*, 1 Fisher, 317, the same plaintiff had recovered a verdict and judgment at law against the same defendant, but as the injunction would operate harshly, and as Mr. Justice CURTIS had doubts of the soundness of his own rulings at law, which were to be tested by writ of error, he refused the injunction. The supreme court consider that on final hearing an injunction should not always be granted, as appears from two citations made by the defendants: the remarks of McLEAN, J., in *Barnard v. Gilson*, 7 How. 650, and rule 93 in equity, published at the beginning of 97 U. S.

For these reasons, I am of opinion that the power to issue an injunction should not be exerted at this time, and I doubt if it should at any time in this case, except an injunction *nisi*, which is not asked for.

Motion denied.



## WILSON v. CHICKERING and others.

*(Circuit Court, D. Massachusetts. February 21, 1883.)*

## PATENTS FOR INVENTIONS—LICENSEE—WHEN CANNOT SUE IN HIS OWN NAME.

A mere license to make and use, without the right to grant to others to make and use the thing patented, though exclusive, will not authorize the licensee to bring suit in his own name for infringement, without joining the patentee. *Semble*, if the patentee refuses to join, a court of equity can give a remedy to the licensee.

In Equity.

*I. D. Van Duzee*, for complainant.

*Hutchins & Wheeler*, for defendants.

LOWELL, C. J. This is a suit for infringement of the patent, No. 169,931, granted to W. F. Ulman, for an improvement in piano-forte pedals. The defendants demur because the owner of the patent is not made a party. The sole plaintiff is Epaminondas Wilson, doing business as E. Wilson & Co., and he alleges an assignment to him by one Jacob Ulman, who was the owner of the whole patent, and whom, for convenience, I shall call the patentee, of the exclusive right to manufacture and sell the patented article in and throughout the United States for 10 years from June 1, 1877.

The defendants argue that the grant is not so exclusive that the plaintiff can maintain his suit alone. The sealed agreement, which is made part of the bill, is in substance as follows:

(1) Ulman licenses and empowers "the plaintiff to manufacture, for the term of 10 years, piano-forte pedal feet containing the said patented improvement, and to sell the same;" but in case of the plaintiff's bankruptcy the license shall end.

(2) The plaintiff agrees to use his best endeavors to introduce into use and sell such pedal feet.

(3, 4, and 5) The plaintiff is to make full quarterly returns of all his sales of said pedal feet, and to pay certain royalties.

(6) The plaintiff is to have the exclusive right to manufacture and sell the pedal feet.

(7) "It is agreed that neither of the parties to this agreement shall, in any event, be liable to bring an action or actions against any infringer or infringers upon said patent."

Counsel have prepared the case with diligence, and have cited many authorities. The statute of July 4, 1836, (5 St. 117,) which is the governing law, provides (section 11) that every patent shall be

assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented, shall be recorded, etc. Section 14 provides that damages may be recovered in an action on the case, to be brought in the name of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States. Section 17 gives jurisdiction in equity as well as at law.

It has been uniformly held that the right of action, or suit at law or in equity, thus given by the statute refers back to section 11, and that those persons may bring actions or suits in their own names who are there mentioned, and, in general, that none others may do so. Therefore, a mere licensee cannot maintain an action at law, nor can he, generally speaking, sue in equity, without joining the patentee. *Gaylor v. Wilder*, 10 How. 477; *Blanchard v. Eldridge*, 1 Wall. Jr. 337; *Potter v. Holland*, 4 Blatchf. 206; *Sanford v. Messer*, 1 Holmes, 149.

The statute of 1870, which codified the patent laws, adopted a more condensed form of statement. In section 36 (16 St. 203) it says simply the patentee may grant *an exclusive right under his patent to the whole or any specified part of the United States*, instead of the *exclusive right to make and use, and to grant to others to make and use, the thing patented*; and the same language is found in Rev. St. § 4898. But the decisions, again, are uniform that this change of phraseology involves no change in the law. See *Paper Bag Cases*, 105 U. S. 766; *Nelson v. McMann*, 4 Ban. & A. 203.

The plaintiff is not the grantee of an "exclusive right" under these statutes, because he has no right to grant to others the right which he himself has to make the pedal feet. This is plain from the whole tenor of the contract. The word "assigns" is not used in it in connection with the plaintiff; if he becomes bankrupt, the license is at an end; he must render quarterly accounts. All these stipulations are inconsistent with such a grant as the statute refers to. He has not, then, a statutory right to proceed alone; and I consider that the general rules of equity pleading would make the patentee a proper party to the cause.

I do not, however, intend to be understood that the plaintiff will be without remedy if he cannot find the patentee, or if the latter is

hostile. The statute does not abridge the power of a court of equity to do justice to the parties before it, if others who cannot be found are not absolutely necessary parties, as in this case the patentee is not. At law, the plaintiff could use the name of the patentee in an action, and perhaps he may have that right in equity under some circumstances. The bill gives no explanation of his absence; but it was said in argument that he is both out of the jurisdiction and hostile. If so, no doubt there are methods known to a court of equity by which the suit may proceed for the benefit of the only person who is entitled to damages. The seventh stipulation, that neither of the parties shall be "liable" to bring an action, means, no doubt, that the plaintiff has no right to subject the patentee to costs, but it does not mean that, upon proper terms, the name of the patentee may not be used, if the law requires it. If it does mean that, it is repugnant and void.

Demurrer sustained; plaintiff has 30 days to amend.

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PLIMPTON v. WINSLOW.

(Circuit Court, D. Massachusetts. February 3, 1883.)

**PATENTS FOR INVENTIONS—PARLOR SKATES.**

Where skates containing an improvement on an earlier patent held by the same inventor were in use or were offered for sale by the same inventor, whether actually sold or not, more than two years before his application for his second or subordinate patent, the latter is void.

In Equity.

*T. W. Clarke*, for complainant.

*George L. Roberts* and *J. L. S. Roberts*, for defendant.

LOWELL, C. J. The plaintiff was the pioneer in the invention of parlor skates. In his first patent, granted in 1863, and which, therefore, expired in 1880, he shows the principle of all subsequent inventions. In his second patent, granted in 1866, which is now in suit, No. 55,901, he made "certain improvements in roller and other skates, patented by me, January 6, 1863," which consisted "in a novel and improved construction and arrangement of the several parts, whereby several advantages are obtained over the old or original mode of construction, as herein fully set forth." The defendant,

who was formerly in the employ of the plaintiff, has lately made improvements in parlor skates, for which he holds one or more patents. He was enjoined at the preliminary hearing because he held a patent which, on its face, was subordinate to that of the plaintiff, and the skates made under it had, as I thought, infringed upon, the plaintiff's rights. Since that time, a new defense has been developed and sustained by a good deal of evidence, which appears to be honest; and the question is of its sufficiency. That defense is that this patent was applied for August 19, 1865, and that more than two years before that day, that is, before August 19, 1863, the invention had been in public use, or on sale, with the plaintiff's consent and allowance, which, by St. 4 July, 1836, § 6, (5 St. 119,) as modified by St. 3 March, 1839, § 7, (5 St. 354,) is a statutory forfeiture.

One witness testifies to the use of a skate, Exhibit 1, by his wife, who is now dead, in June, 1863; another, to his receiving one like Exhibit Forbes Roller Skate, from Mr. Doane, in July, 1863. Doubt is thrown on both these dates by the evidence for the complainant. Other witnesses speak of the use of skates like these exhibits, by the plaintiff, and by others, with his consent, in the city of New York, in May, 1863. After the lapse of 19 years, the exact month in which a witness saw a particular thing must be doubtful. One witness happened to be an editor of a newspaper, and he produces an article written by him and published in his newspaper, May 16, 1863, which gives an account of the opening of the Apollo Rooms for parlor skating, in the course of which he says: "Mr. Plimpton was there with his new patent parlor skate, which appeared to be the favorite, as it enabled the skater to take many of the 'rolls' and 'edge movements.'"

The "patent" referred to is that of 1863, and it is proved that the skates like No. 1, and Forbes, were marked as patented in 1863, and there is no evidence that the old and structurally-imperfect form of skate was used at this time, though they were clearly within the first patent. Only one of the witnesses ever saw the old form of skate, and he saw it before 1861.

Another witness, Doane, who appears to be candid and cautious, had a conversation with the plaintiff in May, 1863, about his parlor skates, and about Doane's furnishing the wood parts for some of them, which he afterwards did, but later than August. But on or about the month of May, the plaintiff sent him certain castings, etc., to inform him what sort of a skate he made, and Doane made up the

Forbes skate, but whether in July, as Forbes says, or in December, as Doane says, I do not decide. Doane was twice recalled, by consent. At his last examination he testified to receiving from the plaintiff several copies of a card, one of which he produced, which contains Plimpton's price-list for three patterns of parlor skates. The price-list is not dated; but it is believed by the witness that he received it early in 1863, and before he bought a moulding machine in May, 1863.

There can be no reasonable doubt, I think, that the skates were like those produced in evidence, and they are substantially like the patented skate of 1866. Several other witnesses testify to a use in New York, which they think was before August, 1863.

The complainant offered no evidence to explain or contradict any of the testimony, except as to the dates of the sale or gift of the two exhibits. If the price-list was published in May, it would be immaterial that no skates were sold before the nineteenth of August, because they were "on sale." The fact does not appear improbable, when we consider that all these skates were marked, and properly marked, as patented in 1863, and it is altogether probable, in the absence of all explanation by the plaintiff, that the plan of obtaining a subordinate patent for his special structural improvements was not thought of until after 1863, although the improvements had been made soon after the first patent was obtained, and before the invention was actually practiced.

I am constrained to say that I find the defendant to have proved that the new skate was in public use or on sale, with the plaintiff's consent, before August 19, 1863.

The defendant has used parlor skates which, under advice of counsel, he thought did not come within the scope of the injunction. Whether he was right or not can now affect only the question of costs, if it can have any effect. I reserve that question. Decree for the defendant.

## BOULTON and others v. MOORE.

(Circuit Court, N. D. Illinois. January 6, 1883.)

## 1. SEAMEN'S WAGES—ON VOYAGE PARTIALLY BROKEN UP.

A contract for a voyage to be performed by seamen on vessels on the northern lakes is terminated by the necessary laying up of the vessel for the winter at an intermediate port; and where no provision is made in the contract for such a contingency, the seamen are entitled to the necessary expenses of their return to the place of shipment, and to their wages up to the time of their arrival at the intermediate port, and, *it seems*, to their wages during the necessary time occupied in their return to the place of shipment.

## 2. TENDER IN ADMIRALTY.

Any real offer to pay money by one then ready and willing to pay, is treated as a valid tender in the admiralty, without inquiry whether the money was produced or not, or in what form; but the offer must be without condition, and it should be renewed in the answer or distinctly made upon the record at some time during the progress of the litigation.

In Admiralty.

C. E. Kremer, for libelant.

W. H. Condon, for respondent.

DRUMMOND, C. J. This is a libel for wages and traveling expenses against the defendant, the captain and owner of the schooner, Zach. Chandler. The libelants shipped on the schooner at Chicago, on the eleventh and thirteenth of November, 1880, for a voyage to Erie, Pennsylvania. The wages were to be four dollars per day. The schooner met with adverse weather, and the winter set in earlier than usual, so that the schooner was obliged to lay up at Escanaba, in Green bay, on the twenty-third of November. The captain, when it was ascertained that the schooner could not proceed on her voyage until the following spring, offered to pay the libelants the wages which had been earned, at the rate stated, up to that time, provided a full acquittance were given. The libelants refused to receive the wages on these terms, and claimed that their expenses should be paid back to Chicago, the place of shipment. This the captain declined to do, and the libelants did not, consequently, receive any compensation whatever, and in consequence the libel was filed for the amount of wages due to them, and for their expenses from Escanaba to Chicago. There was no written contract made between the parties, no shipping papers signed, and nothing said by either party as to what would be the effect upon their rights, provided the voyage was delayed until the following spring.

It is not claimed that the voyage was absolutely broken up, or that it was prevented from being accomplished the next spring. The libelants did not offer to remain on board the vessel and complete the voyage. It seems to have been assumed between the parties that in consequence of the vessel being detained there during the whole winter, it did not become the duty of the libelants to remain, nor of the defendant to retain and pay them until the following spring. There would seem, therefore, to be great force in the position that the contract between the parties, however it may have been as to the voyage, was terminated by their voluntary act. But, independent of this consideration, I am inclined to think that under the facts stated the contract of hiring for the voyage must be regarded as terminated between the parties. Undoubtedly it was the expectation on both sides that the schooner would complete her voyage to Erie that fall; but, in the exercise of a reasonable discretion, having been laid up at Escanaba for the winter, although the voyage might be resumed in the following spring, it could not have been anticipated as a part of the contract under such circumstances that the libelants would have the right to remain there all winter, without any service rendered at the high rate of wages named, or that it was the duty of the defendant to pay them those wages until the end of the voyage in the spring. The navigation between Chicago and Erie is suspended on an average at least four months in the year, and we think it is the general understanding both among seamen and vessel-owners that the necessary laying up of the vessel at any intermediate point, for and because of the winter, is considered in this and similar cases, just before the close of navigation, as terminating the contract of service, and that the seamen are at liberty to abandon the voyage, and the vessel has a right to employ other seamen in the spring when navigation opens. If the detention were only for a short time, then, perhaps, this rule would not prevail; but considering the time during which the vessel is detained, it seems as though this is the only safe course to be adopted in such a case. In this respect, therefore, I agree entirely with the view taken of the case by the district court.

The only real controversy in the case seems to be in relation to the expenses of the libelants from Escanaba to Chicago. They do not claim their wages during the time occupied by the trip, and therefore, strictly speaking, the question of wages during the journey does not arise. When they were discharged at Escanaba, the captain offered them their wages up to that time, on condition that a receipt

in full were given; and it is claimed that this constituted a tender in the admiralty law of the amount that was actually due at the time. It is true that the same strictness does not exist as to tenders in admiralty as at common law. The rule as stated in 2 Pars. Shipp. & Adm. 484, is that "any real offer to pay by one then ready and willing to pay is treated as a valid tender, without inquiry whether the money was produced or not, or in what form." But in this case the tender was made, subject to the condition that a full acquittance should be made, and the offer to pay was not renewed in the answer, nor, so far as appears, was it ever afterwards repeated on the record before or during the progress of the litigation. No written intimation was given to the court after the decree of the district court, and it has not at any time been renewed in this court, although the counsel has said that his client has always been willing to pay that amount. Of his ability to do so this court has no knowledge. In a case cited in the notes to Parsons, one fact which constituted in the opinion of the court a sufficient tender was that it was renewed in the answer, and that was a case where the tender was accompanied with a request for a receipt. Page 484, note 1. In this case the district court allowed the libelants their wages up to the time of their discharge, and their expenses from Escanaba to Chicago, (*The Zach. Chandler*, 7 FED. REP. 684,) and the question is whether they were entitled to their expenses.

In the case of *The Steam-boat Lioness*, 3 FED. REP. 922, the district court gave the libelants their wages from the time of their discharge up to the time of their return to the place of departure, as well as their expenses during the return. In that case the vessel, in the course of her voyage, encountered ice in the Mississippi river and the voyage was broken up. It does not appear how the voyage was broken up, nor whether it was by the mutual consent of the parties. The case decides that the libelants were entitled to their expenses and wages during their return, irrespective of the fact whether the discharge was caused by the fault or act of the vessel-owner. The reasoning of the court, however, appears to proceed on the assumption of a discharge without cause, or a wrongful discharge. The court lays down the rule as well settled that it was the right of the mariners to be transported to their ports of shipment, leaving the inference that it was their right under the facts stated in the opinion. Of the numerous authorities cited in that case scarcely one can be said literally, however it may be in principle, to go the length claimed by the



court; that is to say, in a case where both parties must be presumed to know that the contract may be terminated by some act independent of either; for instance, by *vis major*, as in this case. Here, as we have assumed, there was no wrongful discharge or discharge without a cause, and there was no act done by the vessel-owner which terminated the contract between the parties. This was a verbal contract, but I do not see how, if it had been a written contract of the character proved, it could have affected the principle involved in this part of the case.

In the case of *The Hudson*, 8 FED. REP. 167, where the libelants, without any written articles, shipped on board of a packet running between Pittsburgh and Cincinnati, on the Ohio river, and on the arrival of the packet at Pittsburgh, the river being frozen over and navigation by reason of ice having been suspended for eight days, were discharged, the court held that they were entitled to their wages up to the time of their return to the place of shipment, as well as their expenses during their return. In that case I think it may be inferred, perhaps, that the libelants were discharged without sufficient cause, and in that respect it was different from the case under consideration.

Judge STORY has decided in several cases that where a neutral vessel is captured, it does not necessarily break up the voyage. If the capture is wrongful, the vessel may be released and the voyage proceed, and he therefore calls it, under such circumstances, a mere suspension of the voyage; and he has held that the mariner, under such circumstances, is entitled to his wages until his return to this country. *Emerson v. Howland*, 1 Mass. 45; *Brown v. Lull*, 2 Sumn. 443; and see *Brooks v. Dow*, 2 Mass. 39.

The acts of congress do not provide for the payment of the wages of mariners, or their expenses back to the port of departure, where there is no fault committed or act done by the vessel-owner. Whenever a vessel is sold in a foreign country and the seamen discharged, then three months' wages are to be given to them. Rev. St. § 4582. Where the service of the seaman is terminated before the period contemplated by the agreement, in consequence of the wreck or loss of the vessel, the seaman is entitled to his wages up to the time that the contract is thus terminated, but not for any further time. Rev. St. § 4526. It would seem that in the case of a delay for repairing a vessel, or in consequence of capture, it becomes a question whether the delay is a reasonable one. If it be long continued, de-

pending somewhat, of course, upon the cause of the delay, then it would seem as though the contract between the seamen and the vessel-owner must necessarily be terminated. 2 Pars. Shipp. & Adm. 86; and see *Woolf v. Brig Oder*, 1 Pet. Adm. 262.

Judge STORY admits that in a case of capture, followed by condemnation, the contract is dissolved, and the seamen lose their wages, unless there is a subsequent restitution of the property, or of its equivalent value, with an allowance of freight; and he says that it is the duty of the mariners to remain by the ship as long as there is any hope of recovery of the property; but the question recurs, how long is the mariner to wait until these facts are ascertained? And so in the case of repairs. Undoubtedly, if they can be completed within a short time, the contract remains. But suppose that it takes many months, or a year, or more, to make the repairs, as we can easily imagine there may be cases where they may take that time, is the contract still to continue between the seamen and the ship-owners? The extent to which some of the courts have gone in allowing the wages of seamen is shown by the fact that they have permitted the representatives of the seamen to recover wages for the whole voyage, although the seamen may have died long before the voyage was terminated, (2 Pars. Shipp. & Adm. 58, note 4, and cases there cited,) and so when the seaman was sick and left in a foreign port. *Brunent v. Taber*, 1 Sprague, 243. In examining the cases cited, and others which might be named, one cannot avoid the conclusion that the courts of admiralty have adopted rules much more liberal to seamen than are applied to other persons who ordinarily make contracts with each other. They have appeared studious to guard at every possible point what may be considered as the equities of the sailor. They do not apply the same strict rules of construction to the contracts which he makes as in the contracts of other persons. If there is anything in his contract which the court thinks hard or unfair to the seaman, the court requires clear evidence that he made the contract with a full knowledge of what it contains, and his assent to such clauses therein written, and in the case of any unforeseen event occurring, or one not provided for or anticipated, perhaps it is not too strong an expression to say that the courts construe the contract upon the assumption of what the sailor would have claimed or inserted if the event had been foreseen or anticipated. Their contracts are regarded by the courts of admiralty under the influence of feeling quite as much as of logic. As "wards" of the court, they are treated with the tenderness of a guardian.

This was a contract for a service to be performed on board of the schooner in November, for a voyage between Chicago and Erie, Pennsylvania. The term of service did not extend further than the arrival of the schooner at that port. As has already been intimated, it must be presumed to have been within the knowledge of both parties that there was a chance for the voyage to be arrested by the approach of winter, and by obstructions caused by ice. It has been stated that a contract of service, as such, according to what is believed to be the universal understanding upon these lakes, is terminated by the necessary laying up of the vessel in the fall for winter; but there remains the question as to what is the right of the seamen when the voyage is thus terminated, where the contract is silent in case of the detention of the vessel from the causes named. Under ordinary circumstances, we think, it could be truly said that the event having happened which both parties had the right and whose duty it was to anticipate, that each was left entirely free; that the service having terminated, payment for the service actually performed would release the vessel-owner from all further obligations. On principle, it seems that no other rule could be established; but, as has already been said, this is not a case between ordinary persons, but a case between seamen and the owners of the vessel where circumstances have occurred, which have not been provided for in the contract. As was intimated by the district court in its opinion, we can imagine that cases might arise where it would become a question, even conceding that the expenses of the seamen were to be paid, to what point they might go,—whether to the point of departure or to the port where the voyage was to terminate; in this case the first being at Chicago, and the second at Erie. No doubt difficult questions might arise, in similar cases—depending upon the place between the two ports where the voyage was terminated for the season; but those would have to be decided under the special circumstances of each case, and need not now be anticipated here. The libelants desired to return to the place of departure, and it was not proposed to send them to the port of destination; in fact, the expense and difficulty of reaching that port were much greater.

In looking at the general current of the authorities upon the questions involved here, it seems as though the court could not escape the conclusion that, in favor of the seamen, their expenses should be allowed in this case, because they are seamen, and because a court of admiralty is bound specially to regard their interest.

This case has been the more fully considered by the court, and some of the questions, which only arise, perhaps, incidentally in the case, have been discussed and decided because of the general desire which has been manifested that the court should lay down some rule which will govern in cases of this kind; and it may be as well to state, although the question does not necessarily arise in this case, that the same rule which would award the libelants their expenses from Escanaba to Chicago, would also, although the claim was not here made, give them their wages during the short time occupied in the journey between the two places.

The question of wages and of expenses, where seamen are left on these lakes in the fall, under the circumstances which occurred in this case, is one of very considerable practical importance, because it is occurring in many instances every fall and winter. It would be desirable, as there has been so much controversy on the subject, that it should be determined by the supreme court of the United States; but in all cases where these questions arise, the amount involved is so small that it is hardly possible that they should go before that court, unless, perhaps, when the circuit justice and the circuit judge sit in the circuit court, in an admiralty appeal, and they should certify the questions to the court of last resort. *Ins. Co. v. Dunham*, 11 Wall. 1; *U. S. v. Emholt*, 105 U. S. 414.

The result of the whole matter is that this court substantially agrees with the district court, and will allow the libelants their wages up to the time of their discharge, and their expenses; and I think, as there is not the same sum due to each, the amount should be allowed to each libelant, and not, as the district court found, an aggregate amount due to the libelants together.

It will be seen it is important that the vessel-owners should have a written contract with the seamen, in which provision can be made, in any contracts entered into near the close of navigation, as to the rights of the seamen in case of the detention of the vessel at an intermediate port during the winter.

Where such contracts are fairly made and well understood by the seamen, there can be no doubt they would be binding on them.